No. 6561

No. 15355

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United States
Court of Appeals
for the Ninth Circuit

SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, a Corporation, et al.,

Appellants,

vs.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, et al.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

FILED
JAN 18 1957
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-18-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

ROTH AND BAHRS,
351 California Street,
San Francisco 4, California,

For Appellants.

GILBERT, NISSEN & IRVIN,
117 West Ninth Street,
Los Angeles 15, California,

For Appellees.

In the United States District Court, Northern District of California, Southern Division

No. 35,206

SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, a California Corporation; ANDERSON & ROWE, INC., a California Corporation; ATLAS-UNIVERSAL SERVICE, INC., a California Corporation; ATLAS HEATING & VENTILATING CO., LTD., a California Corporation; CONLIN & ROBERTS, a California Corporation; FRASER & JOHNSTON CO., a California Corporation; GILMORE AIR CONDITIONING SERVICE, a California Corporation; WM. P. GOSS SHEET METAL WORKS, a California Corporation; HOLBROOK MERRILL CO., a California Corporation; INTERNATIONAL SALES CO., a California Corporation; NEW MISSION HEATING & VENTILATING CO., a California Corporation; OTIS SHEET METAL, INC., a California Corporation; WESTERN PLUMBING & HEATING CO., INC., a California Corporation; M. G. WEST COMPANY, a California Corporation; PRICEMETAL CORPORATION, a California Corporation; LLOYD HANNAN, an Individual Doing Business Under the Firm Name and Style of ACE SHEET METAL WORKS; FRED J. BACIOCCO, an Individual Doing Business Under the Firm

Name and Style of STAR SHEET METAL & HEATING CO.; ANDREAS THOMA, an Individual Doing Business Under the Firm Name and Style of THOMA'S SHEET METAL SHOP; HAROLD R. PIKE, an Individual Doing Business Under the Firm Name and Style of AMERICAN HEATING & SHEET METAL CO.; J. OESER, an Individual Doing Business Under the Firm Name and Style of STANDARD FURNACE & PLUMBING CO.; BENJAMIN BARAZOTO, an Individual Doing Business Under the Firm Name and Style of GENEVA SHEET METAL CO.; EDWIN STEVENS, an Individual Doing Business Under the Firm Name and Style of APEX SHEET METAL WORKS; GEORGE P. SCHMITT; SAMUEL COHEN, AL WEST and JAMES McNEILLY, Co-Partners, Doing Business Under the Firm Name and Style of COLAN HEATING & SHEET METAL CO.; ROY DELUCCHI, ELMO DELUCCHI and JOHN JOSEPH DELUCCHI, Co-Partners, Doing Business Under the Firm Name and Style of DELUCCHI SHEET METAL WORKS; FLORENCE M. NELSON, JAMES A. NELSON, JR., and E. L. NATTKEMPER, Co-Partners, Doing Business Under the Firm Name and Style of JAMES A. NELSON CO.; WM. QUIEROLO, SADIE QUIEROLO and RICHARD W. QUIEROLO, Co-Partners, Doing Business Under the Firm Name and Style

of Q-ROLO SHEET METAL PRODUCTS; WM. P. SCOTT, W. W. COCKINS, JOHN L. McCABE and J. J. NICHOLSON, Co-Partners, Doing Business Under the Firm Name and Style of SCOTT CO.; CHAS. F. ANDREWS and EDWARD E. SALOMONE, Co-Partners, Doing Business Under the Firm Name and Style of VALLEY SHEET METAL CO.,

Plaintiffs,

vs.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; LOCAL UNION No. 104 of Sheet Metal Workers International Association; LOCAL UNION No. 75 of Sheet Metal Workers International Association; JOINT INDUSTRY BOARD OF THE HEATING & SHEET METAL INDUSTRY OF MARIN, SONOMA, MENDOCINO, LAKE, NAPA and SOLANO COUNTIES, CALIFORNIA; and W. R. WHITE,

Defendants.

COMPLAINT FOR INJUNCTION

As and for a first cause of action, plaintiffs allege as follows:

I.

This action arises under the provisions of Section 302, subdivisions (a) and (b), of the Labor-Management Relations Act, 1947, as amended (29 USC section 186) (hereinafter referred to as "LMRA 1947"), as hereinafter more fully appears.

II.

Jurisdiction of this action is conferred on this court by the provisions of Section 302, subsection (e), LMRA 1947.

III.

Plaintiffs Sheet Metal Contractors Association of San Francisco; Anderson & Rowe, Inc.; Atlas-Universal Service, Inc.; Atlas Heating & Ventilating Co., Ltd.; Conlin & Roberts; Fraser & Johnston Co.; Gilmore Air Conditioning Service; Wm. P. Goss Sheet Metal Works; Holbrook Merrill Co.; International Sales Co.; New Mission Heating & Ventilating Co.; Otis Sheet Metal, Inc.; Western Plumbing & Heating Co., Inc.; M. G. West Company; Pricemetal Corporation, are corporations organized and existing under and by virtue of the laws of the State of California.

Plaintiff Lloyd Hannan is an individual doing business under the firm name and style of Ace Sheet Metal Works. Plaintiff Fred J. Baciocco is an individual doing business under the firm name and style of Star Sheet Metal & Heating Co. Plaintiff Andreas Thoma is an individual doing business under the firm name and style of Thoma's Sheet Metal Shop. Plaintiff Harold R. Pike is an individual doing business under the firm name and style of American Heating & Sheet Metal Co. Plaintiff J. Oeser is an individual doing business under the firm name and style of Standard Furnace & Plumbing Co. Plaintiff Benjamin Barazoto is an individual doing business under the firm name and

style of Geneva Sheet Metal Co." Plaintiff Edwin Stevens is an individual doing business under the firm name and style of Apex Sheet Metal Works. Plaintiff George P. Schmitt.

Plaintiffs Samuel Cohen, Al West and James McNeilly are co-partners doing business under the firm name and style of Colan Heating & Sheet Metal Co. Plaintiffs Roy Delucchi, Elmo Delucchi and John Joseph Delucchi are co-partners doing business under the firm name and style of Delucchi Sheet Metal Works. Plaintiffs Florence M. Nelson, James A. Nelson, Jr., and E. L. Nattkemper are co-partners doing business under the firm name and style of James A. Nelson Co. Plaintiffs Wm. Quierolo, Sadie Quierolo and Richard W. Quierolo are co-partners doing business under the firm name and style of Q-Rolo Sheet Metal Products. Plaintiffs Wm. P. Scott, W. W. Cockins, John L. McCabe and J. J. Nicholson are co-partners doing business under the firm name and style of Scott Co. Plaintiffs Chas. F. Andrews and Edward E. Salomone are co-partners doing business under the firm name and style of Valley Sheet Metal Co.

IV.

Plaintiffs are engaged in an industry affecting commerce within this district and plaintiffs are employers of employees engaged in an industry affecting commerce within the meaning of Section 302, LMRA 1947.

V.

Defendants Sheet Metal Workers International Association, hereinafter referred to as "Interna-

tional Association"; Local Union No. 104 of Sheet Metal Workers International Association, hereinafter referred to as "Local Union No. 104"; Local Union No. 75 of Sheet Metal Workers International Association, hereinafter referred to as "Local Union No. 75"; Joint Industry Board of the Heating and Sheet Metal Industry of Marin, Sonoma, Mendocino, Lake, Napa and Solano Counties, California, hereinafter referred to as "Joint Industry Board," and W. R. White, are representatives of employees who are employed in an industry affecting commerce within the meaning of Section 302, LMRA 1947. Said International Association, Local Union No. 104, Local Union No. 75, and W. R. White are representatives of the employees of plaintiffs.

Said Joint Industry Board was organized and established July 1st, 1955. Defendant Local Union No. 104 maintains its principal offices in San Francisco, California, within this district. Defendants Local Union No. 75, Joint Industry Board, and W. R. White maintain their principal offices in Vallejo, California, within this district.

The duly authorized officers and agents of International Association, Local Union No. 104, Local Union No. 75, Joint industry Board, and W. R. White are engaged in representing and acting for the employee members of said defendants in the City and County of San Francisco, State of California, and in the counties of Marin, Sonoma, Mendocino, Lake, Napa and Solano counties, Califor-

nia, within this district. Defendant W. R. White is an officer and managing agent, to wit, Business Representative of Local Union No. 75.

VI.

Defendants are attempting to cause and compel plaintiffs to pay and deliver money and other things of value to defendant Joint Industry Board and have threatened to, and will, unless restrained by this court, cause the aforesaid employees of plaintiffs to strike and cease working for plaintiffs unless and until plaintiffs pay and deliver said money and other things of value to defendant Joint Industry Board.

VII.

That neither said money nor other thing of value was or is to be used or applied for any of the purposes specified in Section 302 (c) LMRA 1947, but, on the contrary, said money and other thing of value are being used and will be used for purposes other than those specified in said Section 302 (c) LMRA 1947.

VIII.

That said acts of said defendants, unless enjoined and restrained, will cause substantial and irreparable injury to plaintiffs for which no adequate remedy exists at law.

As and for a second, separate and distinct cause of action, plaintiffs allege:

I.

Plaintiffs hereby adopt and incorporate by refer-

ence thereto, as though fully set forth herein, all of the allegations of the first cause of action set forth herein, save and except paragraph VII thereof.

II.

Defendants are attempting to compel plaintiffs to pay and deliver money and other things of value to defendant Local Union No. 75 and have threatened to, and will, unless restrained by this court, cause aforesaid employees of plaintiffs to strike and cease working for plaintiffs unless and until plaintiffs pay and deliver said money and other things of value to defendant Local Union No. 75.

As and for a third, separate and distinct cause of action, plaintiffs allege:

I.

Plaintiffs hereby adopt and incorpoarte by reference as though fully set forth herein all of the allegations of the first cause of action set forth herein, save and except paragraph VII thereof.

II.

That pursuant to, and in compliance with the demands and threats of defendants, the plaintiffs listed below have paid to defendant Joint Industry Board the sums set opposite their names:

Apex Sheet Metal Works	$ 6.05
Atlas Heating & Ventilating Co., Ltd.	118.67
Gilmore Air Conditioning Service	19.93
Scott Co.	25.15
Western Plumbing & Heating Co., Inc.	27.10
Ace Sheet Metal Works	4.13

Wherefore, plaintiffs pray that defendants and each of them be enjoined and restrained from causing or attempting to cause plaintiffs or any of them to pay any money or thing of value to defendants Joint Industry Board and/or Local Union No. 75, and that said defendants Joint Industry Board and Local Union No. 75 and each of them be enjoined and restrained from receiving or accepting any money or thing of value from plaintiffs.

Plaintiffs further pray that defendant Joint Industry Board be ordered and directed to repay and return all monies or things of value paid or delivered to defendants by plaintiffs or received and accepted by defendants from plaintiffs and for such other relief as to the court may seem just and proper, and for plaintiffs' costs incurred herein.

/s/ ALMON E. ROTH.

/s/ GEORGE O. BAHRS.

[Endorsed]: Filed January 19, 1956.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Come Now the defendants by their attorneys, Gilbert, Nissen & Irvin, and answering plaintiff's complaint, affirms, alleges, and denies as follows:

I.

Answering Paragraph I of the plaintiff's complaint, defendants deny each and every, all and singular, the allegations therein contained.

II.

Answering Paragraph II of the plaintiff's complaint, defendants deny each and every, all and singular, the allegations therein contained.

III.

Answering Paragraph III of the plaintiff's complaint, defendants allege that they do not have sufficient information upon which to form a belief, and based upon such lack of information and belief, deny each and every, all and singular, the allegations therein contained.

IV.

Answering Paragraph IV of the plaintiff's complaint, defendants admit that the plaintiffs other than the plaintiff Sheet Metal Contractors Association of San Francisco are engaged in the sheet metal contracting business within this district and in the course of said business employ journeymen sheet metal workers and apprentices and also in the course of said business make purchases of certain quantities of goods and materials originating outside of the State of California, but except as expressly admitted herein, defendants deny each and every, all and singular, the allegations therein contained.

V.

Answering Paragraph V of the plaintiff's complaint, defendants admit that defendant Local Union No. 104 is the collective bargaining representative of the journeymen sheet metal workers and

apprentices employed by the plaintiff; that the defendant Joint Industry Board was organized and established on about June 10, 1955, and became effective on July 1, 1955; that defendant Local Union No. 104 maintains its principal offices in San Francisco, California, within this district; that defendants Local Union No. 75 and Joint Industry Board maintain their respective principal offices in Vallejo, California, within this district; that defendant W. R. White is an officer and managing agent, to wit, Business Representative of said defendant Local Union No. 75; but except as expressly admitted herein, defendants deny each and every, all and singular, the allegations therein contained.

VI.

Answering Paragraph VI of the plaintiff's complaint, defendants deny each and every, all and singular, the allegations therein contained.

VII.

Answering Paragraph VII of the plaintiff's complaint, defendants deny each and every, all and singular, the allegations therein contained.

VIII.

Answering Paragraph VIII of the plaintiff's complaint, defendants deny each and every, all and singular, the allegations therein contained.

Second Cause of Action

I.

Answering Paragraph I of the Second Cause of Action of the plaintiff's complaint, defendants hereby incorporate by reference as though fully set forth herein all of defendants' answers to the allegations of plaintiff's First Cause of Action, save and except defendants' answer to Paragraph VII thereof.

II.

Answering Paragraph II of the Second Cause of Action of the plaintiff's complaint, defendants deny each and every, all and singular, the allegations therein contained.

Third Cause of Action

I.

Answering Paragraph I of the Third Cause of Action of the plaintiff's complaint, defendants hereby incorporate by reference as though fully set forth herein all of defendants' answers to the allegations of plaintiff's First Cause of Action, save and except defendants' answer to Paragraph VII thereof.

II.

Answering Paragraph II of the Third Cause of Action of the plaintiff's complaint, defendants deny each and every, all and singular, the allegations therein contained.

Wherefore, defendants and each of them pray that plaintiff's complaint be dismissed forthwith and that plaintiff take nothing by its said action as against defendants, and that judgment be entered in favor of defendants together with their costs of suit incurred herein, and for such other relief as to the Court may seem fitting and proper.

Dated this 10th day of April, 1956.

GILBERT, NISSEN & IRVIN,

By /s/ LOUIS A. NISSEN,
Attorneys for Defendants.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 12, 1956.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Now Come the defendants by their attorneys, Gilbert, Nissen & Irvin, in the above-entitled and as by Rule 56 of the Federal Rules of Civil Procedure provided, move the Court for an Order dismissing the plaintiff's complaint and for summary judgment herein on the ground that plaintiff's complaint does not state a cause of action; upon the further ground that even if the plaintiff's complaint should be deemed to state a cause of action that the defendants are nevertheless entitled to judgment herein; upon the further ground that under all the

facts, pleadings, documents, papers, records, and files in this action that the defendants are entitled to judgment herein; and upon the further ground that no case or controversy appears in this action such as to entitle the plaintiff herein to any relief of this court whether by way of judgment, injunction, or declaratory judgment or any other type of judgment or relief, and that as a matter of fact the defendants herein are entitled to the dismissal of this complaint and relief from being forced to defend harassing, frivolous, and improper actions.

This motion is made and based upon the Notice of Motion served and filed herewith, and upon the Stipulation of Facts entered into between the parties filed herewith, and upon the pleadings, papers, records, documents and files in this action.

Dated this 22nd day of June, 1956.

GILBERT, NISSEN & IRVIN.

By /s/ ROBERT W. GILBERT,
Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 23, 1956.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto as follows

for the purposes of plaintiffs' and defendants' motions for summary judgment only:

1. During the calendar year 1955 plaintiff employers collectively made direct purchases of goods and materials from outside the State of California of a value in excess of $500,000; and that plaintiff employers collectively made purchases in California through local dealers of goods and materials originating outside the State of California of a value in excess of $1,000,000; and plaintiffs collectively rendered services and furnished materials outside the State of California having a value of approximately $125,000.

2. Plaintiff employers are, and for several years last past, have been members of Sheet Metal Contractors Association of San Francisco. For several years last past plaintiff employers, and each of them, have been members of a multi-employer group for purposes of collective bargaining, and during said period plaintiffs, and each of them, have authorized Sheet Metal Contractors Association of San Francisco to negotiate and enter into a collective bargaining contract with Local Union No. 104 as the representative of the employees of plaintiffs, and for several years last past Local Union No. 104 has negotiated and entered into collective bargaining agreements with Sheet Metal Contractors Association of San Francisco.

3. On or about the first day of July, 1955, Sheet Metal Contractors Association, acting on behalf of,

and as the agent of, plaintiff employers, and each of them, made and entered into a collective bargaining agreement with Local Union No. 104, a copy of which is attached hereto and made a part hereof as Exhibit "A" as though fully set forth.

4. On or about the tenth day of June, 1955, Associated Heating and Sheet Metal Contractors, Inc., acting as the agent of, and on behalf of, various employers, other than the plaintiffs, doing business as Sheet Metal Contractors in the Counties of Marin, Sonoma, Mendocino, Lake, Napa and Solano, California, made and entered into a collective bargaining agreement with defendant Local Union No. 75 as representative of the employees of said employers. A copy of said agreement is attached hereto and made a part hereof as Exhibit "B" as though fully set forth.

5. During the calendar year 1955 said employers collectively made direct purchases of goods and materials from outside the State of California of a value in excess of $250,000, and during the calendar year 1955 said employers collectively made purchases in California through local dealers of goods and materials originating outside the State of California of a value in excess of $500,000.

6. On or about the tenth day of June, 1955, Associated Heating and Sheet Metal Contractors, Inc., acting as the agent of, and on behalf of, various employers, other than the plaintiffs, doing business as Sheet Metal Contractors in the Counties of

Marin, Sonoma, Mendocino, Lake, Napa and Solano, California, made and entered into a trust agreement with defendant Local Union No. 75 as representative of the employees of said employers. A copy of said agreement is attached hereto and made a part hereof as Exhibit "C" as though fully set forth.

7. On or about the tenth day of June, 1955, Associated Heating and Sheet Metal Contractors, Inc., nominated and appointed Paul Striechan, Kenneth Malm, Del Turney, Dave Bartholow, Joe Bell, and Frank Hall to act on its behalf as trustees of said trust, and said persons so named accepted said nominations and appointments and were and are acting as such trustees.

8. On or about the tenth day of June, 1955, defendant Local Union No. 75 nominated and appointed W. R. White, Harry Shortess, Charles Huber, David Beasley, Ray Detmayer, and Al Buratto to act on its behalf as trustees of said trust, and said persons so named accepted said nominations and appointments and were and are acting as such trustees.

9. That between July 1, 1955, and the present date, the following plaintiff employers have carried on jobs in the Counties of Marin, Sonoma, Mendocino, Lake, Napa, or Solano, California, employing on such jobs sheet metal workers who were members of defendant Local No. 104:

Ace Sheet Metal Works,

Apex Sheet Metal Works,
Gilmore Air Conditioning Service,
Western Plumbing and Heating Co., Inc.,
Atlas Heating & Ventilating Co., Ltd.,
Scott Co.,
Valley Sheet Metal Co.,
Otis Sheet Metal, Inc.

10. Between October 13 and December 15, 1955, defendant Local No. 75 threatened to encourage, cause and induce the employees of plaintiffs, and each of them, listed in Paragraph 9 above, to refrain from performing and to refuse to perform any services for said plaintiffs in the Counties of Marin, Sonoma, Mendocino, Lake, Napa, and Solano, California, unless said plaintiffs and each of them paid the sum of two and one-half cents (2½c) for each hour worked in said Counties into the Joint Industry Board Fund specified in Section 19 of Exhibit "B" hereof and Section Q of Exhibit "C" hereof.

11. That, thereafter, during the month of December, 1955, the following plaintiff employers commenced paying said sum of two and one-half cents (2½c) an hour into said Joint Industry Board Fund for every hour worked by each of their employees performing work in the counties above named, to wit:

Ace Sheet Metal Works,
Apex Sheet Metal Works,
Gilmore Air Conditioning Service,

Western Plumbing and Heating Co., Inc.,
Atlas Heating & Ventilating Co., Inc.,
Scott Co.,
Valley Sheet Metal Co.,
Otis Sheet Metal, Inc.

And said employers have continued to make said payments ever since and have notified defendant Local No. 75 that they are doing so solely because of the acts of defendant set forth in Paragraph 10 above.

Dated: June 22, 1956.

GILBERT, NISSEN & IRVIN,

By /s/ ROBERT W. GILBERT,
Attorneys for Defendants.

ROTH AND BAHRS.

By /s/ GEORGE O. BAHRS,
Attorneys for Plaintiffs.

EXHIBIT "A"

Standard Form of Union Agreement

Sheet Metal, Roofing, Ventilating and Air Conditioning
Contracting Divisions of the Construction Industry

This agreement entered into this 1st day of July, 1955, by and between Sheet Metal Contractors Association of San Francisco, hereinafter referred to

as the Employer, and Local Union No. 104, of Sheet Metal Workers' International Association of City and County of San Francisco, California, hereinafter referred to as the Union.

Article I.

Section 1. This Agreement covers the rates of pay, rules and working conditions of all employees of the Employer engaged in the manufacture, fabrication, assembly, handling, erection, installation, dismantling, reconditioning, adjustment, alteration, repairing, and servicing of all ferrous or nonferrous sheet metal work of No. 10 U. S. gauge or its equivalent or lighter gauge, and all other materials used in lieu thereof, all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches and all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

* * *

Article IV.

* * *

Section 3. Employees hired outside of the territorial jurisdiction of the Union to perform work outside of said jurisdiction and within the jurisdiction of another Local Union of Sheet Metal Workers' International Association shall be deemed to have complied with the provisions of this Article by acquiring and retaining membership in the said

Local Union in whose jurisdiction such employee performs said work.

* * *

Article VII.

Section 1. The minimum rate of wages for journeymen sheet metal workers covered by this Agreement when employed in a shop or on a job within the jurisdiction of the Union to perform any work specified in Article I of this Agreement shall be $..... per hour, except as hereinafter specified in Section 2 of this Article. Effective August 1, 1955, $3.075 per hour; September 1, 1955, $3.15 per hour, plus 7½c per hour Welfare Plan.

Section 2. On all work specified in Article I of this Agreement, fabricated and/or assembled within the jurisdiction of this Union, or elsewhere, for erection and/or installation within the jurisdiction of any other Local Union affiliated with Sheet Metal Workers' International Association, whose established wage scale is higher than the wage scale specified in this Agreement, the higher wage scale of the job site Union shall be paid to the journeymen employed on such work in the home shop or sent to the job site.

Section 3. Except as provided in Sections 2 and 4 of this Article, the Employer agrees that journeymen sheet metal workers hired outside of the territorial jurisdiction of the Union to perform or supervise work outside the jurisdiction of the Union and within the jurisdiction of another Local Union

affiliated with Sheet Metal Workers' International Association, shall receive the wage scale and working conditions of the Local Union in whose jurisdiction such work is performed or supervised.

Section 4. When sent by the Employer to supervise or perform work specified in Article I of this Agreement outside of the jurisdiction of the Union and within the jurisdiction of another Local Union affiliated with Sheet Metal Workers' International Association, journeymen sheet metal workers covered by this Agreement shall be paid at least the established minimum wage scale specified in Section 1 of this Article, but in no case less than the established wage scale of the Local Union in whose jurisdiction they are employed, plus all necessary transportation, traveling time, board and expense while employed in the jurisdiction of any other affiliated Local Union and the Employers shall be otherwise governed by the established working conditions of said Local Union. The provisions of this Section shall also apply to all jobs located where no Local Union of Sheet Metal Workers' International Association has jurisdiction.

Section 5. In applying the provisions of Sections 2, 3, 4 of this Article VII, the term "wage scale" shall include the value of all applicable hourly contractual benefits in addition to the hourly wage rate provided in said Sections.

* * *

Article XII.

Section 1. This Agreement and Addenda Number 1 through 3 attached hereto shall become effective on the 1st day of July, 1955, and remain in full force and effect until the 1st day of July, 1956, and shall continue in force from year to year thereafter unless written notice of reopening is given not less than ninety (90) days prior to the expiration date. In the event such notice of reopening is served, this Agreement shall continue in force and effect until conferences relating thereto have been terminated by either party.

In witness whereof, the parties hereto affix their signatures and seal this 1st day of August, 1955.

LOCAL UNION No. 104 OF SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,

By /s/ FRANK BUCK.

SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO,

FRED BACIOCCO,
President;

ANTHONY MELEY,
Secretary.

[Seal]

EXHIBIT "B"

(Copy)

Standard Form of Union Agreement

Sheet Metal, Roofing, Ventilating and Air Conditioning Contracting Divisions of the Construction Industry

This agreement entered into this 10th day of June, 1955, by and between Associated Heating and Sheet Metal Contractors, Inc., 2054-4th Street, San Rafael, Calif., hereinafter referred to as the Employer, and Local Union No. 75, of Sheet Metal Workers' International Association of Marin, Sonoma, Mendocino, Lake, Napa and Solano Counties, hereinafter referred to as the Union.

[Articles I, IV and VII of this agreement are identical to those set forth in full in Exhibit A.]

* * *

Article XII.

Section 1. This Agreement and Addenda Number 1 through 6 attached hereto shall become effective on the 1st day of July, 1955, and remain in full force and effect until the 30th day of June, 1956, and shall continue in force from year to year thereafter unless written notice of reopening is given not less than ninety (90) days prior to the expiration date. In the event such notice of reopening is served, this Agreement shall continue in force and effect until conferences relating thereto have been terminated by either party.

In witness whereof, the parties hereto affix their signatures and seal this 10th day of June, 1955.

LOCAL UNION No. 75 OF SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,

By .....

(Signature of Officer or Representative.)

ASSOCIATED HEATING & SHEET METAL CONTRACTORS, INC.,

By .....

(Signature of Officer or Representative.)

Addenda

* * *

17. Disputes:

It is hereby agreed and understood that the Working Rules and conditions of Local Union No. 75 are specifically referred to and made a part of this agreement. Any disputes arising out of this agreement shall be referred to the Joint Industry Board. The provisions for the settling of all disputes as set forth in the "Trust Agreement" of the Joint Industry Board shall be substituted for Article IX (nine), Sections one (1) through three (3).

The Joint Industry Board shall not alter or amend the Bargaining Agreement without a majority vote of both the Union and the Association membership.

* * *

19. Joint Industry Board:

A—Each Employer shall contribute to the Joint Industry Board Fund, the sum of two and one-half cents ($.025) for each hour worked (including overtime and for the equivalent hours of paid vacation time), by all journeymen and apprentices who are employed on work described in Article 1 (one) of the Standard Form of Union Agreement, for and/or within the jurisdiction of Local Union No. 75.

B—The report, covering all employees for all hours worked for the previous month, shall be forwarded to the Administration Office of the Joint Industry Board of the Heating and Sheet Metal Industry of Marin, Sonoma, Mendocino, Lake, Napa and Solano Counties, located at 316 Viriginia Street, Vallejo, California, with check covering same, not later than the tenth (10th) day of each month. Payments not made by the last day of such month shall be assessed a Twenty-five Dollar ($25.00) penalty, and this penalty shall be imposed for each month that said contribution is delinquent. If the contributions are delinquent, suit may be

instituted to collect payments and the Employer will pay reasonable attorneys' fees and court costs.

C—"The Trust Agreement creating the Joint Industry Board of the Heating and Sheet Metal Industry of Marin, Sonoma, Mendocino, Lake, Napa and Solano Counties is specifically referred to and made a part of this Agreement."

* * *

(Copy)

EXHIBIT "C"

Trust Agreement of
Joint Industry Board

This agreement entered into this 10th day of June, 1955, by and between Associated Heating and Sheet Metal Contractors, Inc., hereinafter referred to as the Employer, and Local Union No. 75 of Sheet Metal Workers' International Association of Marin, Sonoma, Mendocino, Lake, Napa and Solano Counties, hereinafter referred to as the Union.

There shall hereinafter be established a Joint Industry Board to be known as "Joint Industry Board of the Heating and Sheet Metal Industry of Marin, Sonoma, Mendocino, Lake, Napa and Solano Counties." Said Joint Industry Board shall be composed of an equal number of Employer and Union Representatives.

A—Purposes:

It shall be the functions of the Joint Board:

1—To supervise, administer and carry out all funds provided for by the Bargaining Agreement, except the Health and Welfare Fund which is administered by the Joint Trustees of the Sheet Metal Workers Health and Welfare Fund of Northern California.

2—To aid in the settlement of any and all disputes of any nature whatsoever which may arise between the Union, its members, agents and/or representatives, and the above-named association, its members, and all other employers of union members who are signatories to agreements with the union.

3—To set up and administer a joint arbitration committee and to provide further arbitration procedures should the Joint Arbitration Committee be unable to decide or resolve a dispute.

4—To supervise and administer a joint apprenticeship program; to establish Apprenticeship Standards; to attract persons of good moral character, ambition and competency to the industry; and to provide for the training of such persons in order to maintain and continue the high degree of skill and quality of work which now prevails in the Heating and Sheet Metal Industry.

5—To assist and aid the Heating and Sheet Metal Industry in continuing the high degree of skill which it now enjoys; to provide a forum where

Management and Labor can discuss ways and means for further co-operation; to counsel and advise and render such other assistance to individual members of the Union, and all employers who are signatories hereto, which will aid and facilitate efforts to effectuate high standards in the Industry. It is understood that neither the Union or Association shall be superseded by the Joint Industry Board as far as the relationship existing between each of them and their respective members; nor do they relinquish their responsibility to their respective members; nor do they relieve their members from the liabilities and obligations such members have to the Union or Association, respectively, under the provisions of the Constitution and By-Laws of each of them, and the same shall continue in full force and effect.

6—To meet with representatives of public and quasi-public bodies or groups and with other groups or associations in the construction Industry or allied fields; to foster, promote and urge beneficial legislation within the State of California relating to the Heating and Sheet Metal Industry, its standards, specifications, improve technological skills or any other matter pertaining thereto; to acquaint the public at large with the work of the Heating and Sheet Metal Industry and to foster good public relations. No action may be taken which knowingly violates the anti-trust and monopoly laws of the United States, the State of California, or any political subdivisions thereof. The Joint Industry Board as such will take no active part in any political campaign.

B—Composition:

1—The Joint Industry Board shall be made up of six (6) members representing the Employers, and six (6) members representing the Union. Two employer members and two union members from each of the following three areas: Marin County, Sonoma-Mendocino Counties, and Napa-Solano Counties.

2—The employer members shall be actively engaged in the Heating and Sheet Metal Industry in the geographical areas covered by the Bargaining Agreement and shall employ members of Local Union #75.

3—The designation of any representative may be revoked at any time at the pleasure of the party making the appointment. Any vacancy on the Board, caused by death, resignation or revocation of the designation shall be filled by the Union or Employers, respectively, as the case may be. Notice of any new designation is to be given in writing to the Secretary of the Board.

C—Limitation of Liability:

Each of the Board members shall be protected in acting upon any paper or document believed by him to be genuine and to have been made, executed or delivered by the proper party purporting to have made, executed or delivered the same, and shall be protected in relying and acting upon the opinion of legal counsel in connection with any matter per-

taining to the administration or carrying out the function of the Board.

The Board members shall not be liable for any action taken or omitted by them in good faith, or for acts of any agent, employee or Attorney selected by the Board with reasonable care, or for any act or omission of any other Board member.

No member of the Board shall be liable individually for the failure of any bank or other agency where funds may be deposited.

D—Quorum:

1—It shall take at least three (3) of the employer members and three (3) of the union members to establish a quorum for an official meeting of the Joint Industry Board.

E—Absentees:

If for any reason a member of the Joint Industry Board cannot be present at a meeting, the Union and the Employer Groups, respectively, shall have the power and authority to appoint another person automatically to act as an alternate and take the place of the absent Board member at a meeting or meetings. This person shall sit at these meetings as a member of the Board, with full power to vote and act upon all questions and resolutions that shall come up at that meeting or meetings in which the said alternate shall sit for the absent Board member.

F—Expenses:

The Board shall have the authority to provide for the payment of expenses for attending Board or Committee meetings or for other expenses incurred in connection with Joint Industry Board business.

G—Personnel:

The Board shall employ a General Manager and a Field Representative, and shall have the authority to employ such other personnel, professional or otherwise, as it may deem necessary for the proper fulfillment of its duties, and shall have the power to fix salaries and compensations for said personnel.

H—Officers:

The Officers for the Joint Industry Board shall be: The President, Vice-President, Secretary and the Treasurer.

I—Election of Officers:

All Officers shall be elected by a majority vote of the Employer members, together with a majority vote of the Union members. Two (2) of the officers shall be from the Employers and two (2) of the officers shall be from the Union members. The term of office shall be one year. Election shall be held in the month of January.

J—Duties of Officers:

President

(a) The President shall preside at all meetings of the Board and shall be a member ex-officio of all regular and special committees. The President shall be entitled to vote on all business properly brought before the Board.

(b) The business of the Board shall be conducted under the general direction of the President.

(c) He shall see that all funds of the Board are deposited in its name and to its credit in such depositary as may be designated by the Board, subject to allocation by the Board. He shall see that disbursements are made as ordered by the Board.

(d) He shall perform such other duties as pertain to the office of President and shall see that all resolutions of the Board shall be carried into effect.

Vice-President

The Vice-President shall, in the absence or disability of the President, perform the duties and exercise the power of the President and shall perform such other duties as the Board shall prescribe by resolution.

Secretary

The Secretary shall be responsible for the recording of all minutes of the meetings of the Joint Board.

Treasurer

The treasurer shall examine and verify the accounts of all funds received by the Board, collected by the General Manager and deposited by him.

General Manager

There shall be a General Manager who shall be appointed by a majority vote of the Union group, together with a majority vote of the Employer Group. The compensation and the terms and conditions of his employment shall be fixed by the Board.

The General Manager shall be appointed for the duration of this Agreement, provided, however, that his services may be terminated by a majority vote of the Union Group, together with a majority vote of the Employer Group.

The duties of the General Manager shall be as follows:

(a) The General Manager shall manage and operate the business office of the Board, shall attend all meetings of the Board but shall not be entitled to vote thereat; he shall keep minutes of the proceedings and carry on correspondence of the Board. He shall conduct all Board business assigned to him by the President or Vice-President; he shall, with the sanction of the Board or with the approval of the President or Vice-President between meetings, be permitted to employ whatever help may be required for the proper performance of his duties.

(b) The General Manager shall be a member ex-officio of all regular and special committees. He

shall not be entitled to vote on any committee business nor shall his presence at regular or any special committee meetings be counted in order to constitute a quorum of the said committee. He shall be solely responsible for all records entrusted to and kept by the Board, and shall make them available to the Board in the following manner:

The Board may instruct the General Manager at any time to make them available for inspection by a Board member or may designate a committee to inspect his records at the request of any member of the Board.

(c) The General Manager shall collect all funds as may be due the Board and shall manage and keep records and accounts of all funds so received. All monies received by him shall be deposited immediately in the name of the Board in such banks or trust companies as may be designated. The General Manager shall see that all bills and other indebtedness are paid when ordered by the Board, and he shall make a detailed report thereof at the meetings of the Board. The accounts kept by him shall be audited by an independent auditor selected by the Board. He shall furnish a bond to the Board satisfactory in form and amount, the fee premium to be paid by the Board.

Field Representative

The Joint Industry Board shall have the authority to appoint a Field Representative. This shall require a majority vote of the Union Group together with a majority vote of the Employer Group.

The compensation and the terms and conditions of his employment shall be fixed by the Board.

The Field Representative shall be appointed for the duration of this Agreement, provided, however, that his services may be terminated by a majority vote of the Union Group, together with a majority vote of the Employer Group.

The Field Representative shall be responsible to and work under the direction of the General Manager.

The Field Representative shall furnish a bond to the Board satisfactory in form and amount, the fee and premium to be paid by the Board.

K—Signing of Checks:

All Joint Industry Board checks shall be signed by the General Manager and the Treasurer or by either the General Manager or the Treasurer and the President or Vice-President of the Board.

L—Removal of Officers:

Any one or more of the officers selected by the Board may be removed by a majority vote of the Employer members, together with a majority vote of the Union members, based on the full membership of the Board.

M—Vacancies:

If any officer resigns or is removed from office or for any reason is unable to continue to serve in

the office which he holds, the office left vacant shall be filled by the Board in the same manner as hereinbefore provided for election of officers, except that such person so elected shall serve only for the unfinished portion of his predecessor's term.

The regular meeting of the Board shall be held on the Third Tuesday of each month or such other day as the Board shall fix. Written notice of the meetings shall be mailed by the General Manager to all members of the Board.

Special meetings may be called by the President or Vice-President or upon the request of three members of the Board to the President. Written notices of such meetings shall be mailed by the General Manager to all members of the Board at least three days before such special meetings.

0—

The Board shall have the power to make rules and regulations for the conduct of its affairs. It shall have the power to make rules and regulations, binding on all Employers who are signatories hereto and upon the Union, as are consistent with all the terms and conditions of this and the Bargaining Agreement, provided, however, that they are not inconsistent with the Constitution and By-Laws of the Local Union and its International, the Sheet Metal Workers' International Association, or the Constitution and By-Laws of the Association signatory hereteo.

The Board shall have the power and authority to study and correct improper working conditions and shall decide all controversies or disputes arising under this agreement. Decision of the Board shall be made by a majority vote of the Union members, together with a majority vote of the Employer members, based on full membership of the Board. In the event that the Board is unable to reach agreement, the members thereof shall choose an impartial person who shall act as arbitrator. In the event that the members of the Board are unable to reach agreement on an arbitrator within ten days they shall request the President of the University of San Francisco to designate an arbitrator. The decision of the arbitrator shall be final and binding on all parties.

P—Committees:

The Joint Industry Board shall have the power to appoint all committees which it feels are necessary or desirable for carrying out the functions and purposes of the Joint Industry Board. All committees shall be composed of an equal number of representatives from the Employers and the Union and the Chairman of each committee shall be a member of the Joint Industry Board.

Q—Joint Industry Board Fund:

Each Employer shall pay into a fund to be designated as the Joint Industry Board Fund the sum of two and one-half cents (2½) per hour for each

hour worked by each employee covered by the Bargaining Agreement.

Said payment shall be based upon the hours worked, payable commencing as of July 1, 1955, and payable thereafter for each succeeding month during the term of this Agreement.

This Agreement shall become effective on the 1st day of July, 1955, and remain in full force and effect until the 30th day of June, 1956, and shall continue in force from year to year thereafter unless written notice of reopening is given not less than ninety (90) days prior to the expiration date. In the event such notice of reopening is served, this Agreement shall continue in force and effect until conferences relating thereto have been terminated by either party.

In witness whereof, the parties hereto affix their signatures and seal this 10th day of June, 1955.

LOCAL UNION #75 OF SHEET METAL WORKERS' INTERNATIONAL ASSN.,

By /s/ W. R. WHITE,

(SEAL)

ASSOCIATED HEATING & SHEET METAL CONTRACTORS, INC.,

By /s/ WM. A. GABLE.

(SEAL)

[Endorsed]: Filed June 23, 1956.

[Title of District Court and Cause.]

MOTION OF PLAINTIFFS FOR SUMMARY JUDGMENT

Plaintiffs hereby move the Court for summary judgment against defendants and each of them as prayed for in the complaint on file herein.

This motion is based upon the pleadings and upon the stipulation on file in the above-entitled matter.

ROTH AND BAHRS,

By /s/ GEORGE O. BAHRS,
Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed June 26, 1956.

[Title of District Court and Cause.]

MEMORANDUM ORDER

These are cross motions for summary judgment in an action brought under 29 U.S.C. 186(c) by a number of employers against two labor unions, a parent organization of those two labor unions, a labor official, and a joint industry board.

The action arises out of an agreement between an employers' group known as Associated Heating and Sheet Metal Contractors, Inc., and Local #75 of the Sheet Metal Workers' International Association, providing for the establishment of a "Joint

Industry Board," and for the contribution by the employers covered by the agreement of a sum of 2½c for each hour worked by the members of the Union for any of the employers, to defray the expenses of the Joint Industry Board. The Board consists of six members for the employers and six members for the union. Decisions of the Board are made by a concurrence of a majority of the employer members with a majority of the union members. A fair reading of the Trust Agreement of Joint Industry Board, which governs the relationship of the parties thereto, leads to the conclusion that the power to expend the funds contributed by the employers, resides in the Board, and is thus dependent upon the approval of the employer members.

The purposes for which the Board is established are not entirely clear. The Trust Agreement must be read in the context of the collective bargaining agreement concluded between the same parties, and which, by cross-references in the two documents, is made the prevailing agreement in case of conflict. Thus read, the functions of the Board would seem to be the establishment and administration of a joint arbitration committee to settle all grievances arising between the parties, or any of them, or any of the members of either of them, whether or not related to the collective bargaining contract; the establishment, supervision and administration of a joint apprenticeship program, including a training program and a program for attracting desirable per-

sons to the industry; "to assist and aid" the industry in maintaining high standards of skill, and to render assistance to employers, unions, and individuals in the industry for the purpose of effectuating high standards in the industry; to carry on publicity and lobbying for the benefit of the industry; and "to supervise, administer and carry out" (sic) all funds provided for by the bargaining agreement between the parties, except the Health and Welfare Fund. That fund is separately administered, and seems to be the only fund of substance in the bargaining agreement, other than the fund for the Joint Industry Board, which is the subject of this action.

The claim of plaintiffs is that the payment, pursuant to the "Trust Agreement of Joint Industry Board," of 2½c per man-hour to the Joint Industry Board fund violates the prohibition against payments by employers to representatives of their employees contained in 29 U.S.C. 186, commonly known as Section 302 of the Labor Management Relations Act of 1947. The prohibition in question is contained in two provisions which read as follows:

> "(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> "(b) It shall be unlawful for any representative of any employees who are employed in

an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value." 29 U.S.C.A. Sec. 186(a) and (b).

A preliminary contention by defendants may be simply disposed of. It is that the statute in question cannot apply to this agreement, because the signatory on the employer side is not any individual employer of union members, but the association of employers which does not itself hire any employees. The purpose of Congress to prevent misuse of funds, and the possibility of the concealment of bribes and extortions in the form of payments by employers to labor representatives, may not be so easily evaded as defendants suggest. The funds in question obviously come from the employers. The fact that the employer association signed the agreement on behalf of the employers, rather than the individual employers, does not change the realities of the situation. The agreement to pay is in fact and law made by the employers.

The question for decision, therefore, is whether this agreement for payments to the Joint Industry Board, which is composed of six employer and six union members, is an agreement to pay to "any representative of any of his employees" within the meaning of 29 U.S.C.A. 186.

Substantially the same issue was before the court in United Marine Division v. Essex Transportation Co., 216 F. 2d 410 (3d Cir. 1954). The Court there

held that an agreement for payment of funds to six trustees, chosen half by employers and half by the union, was not an agreement to pay funds "to any representatives of any of his employees." The Court said:

> "These trustees were not, in our judgment, representatives of the employees. They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. The terms under which they act were carefully spelled out." Id., at 412.

The distinction between the Essex case and the case at bar is the fact that in the Essex case the fund in question was a welfare fund, whereas in the instant case the fund does not include the welfare and pension funds and is subject to expenditure on purposes of a rather large and vague nature. Nevertheless, the rationale of the Essex case seems to be equally applicable here. The Joint Industry Board will hold the funds in question in trust for the purposes enumerated in the Trust Agreement. Those purposes, while in certain cases auxiliary to collective bargaining procedures, go beyond them and are not confined by the terms of the collective bargaining agreement except in case of conflict. It may be

instructive to note what another court has said in answer to an argument similar to that of the employers here, that the Joint Industry Board funds may conceivably be used to defray general union expenses. In Upholsterers' International Union v. Leathercraft Furn. Co., 82 F. Supp. 570 (E. D. Pa. 1949), the employers pointed to the possibilities of abuse inherent in a situation where the union representatives were in sole control of funds contributed by the employer for health and welfare purposes. The Court said:

> "* * * whenever the trustees use, or attempt to use, directly or indirectly, the fund for a purpose other than for the sole and exclusive benefit of the employee-members, this court, when called upon, will enjoin the trustees from making the improper expenditures. The burdening of the fund with undue administrative expenses or lush salaries for union officials will not be tolerated; * * *" Id., at 573.

The Joint Industry Board is not a part of the union, and its governing agreement expressly provides for the separate character of the Board from either of the parties, and expressly preserves their duties and relationships with respect to each other and each of them with respect to their members. The agreement provides for a careful accounting and separate deposit system for Joint Industry Board funds from those of the union. If the employer members refuse to sanction an expenditure, for any reason, there is a provision for arbitration

in the agreement. Under these circumstances, this court cannot hold that the payments in question are payments "to any representative." The union members of the Joint Industry Board, in that capacity, are not "representatives" of the employees within the meaning of 29 U.S.C. 186.

Plaintiffs' motion for summary judgment is denied, and defendants' motion for summary judgment is granted. Let appropriate orders be prepared.

16th August, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed August 20, 1956.

In the United States District Court, Northern District of California, Southern Division
Civil Action File No. 35206

SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, a California Corporation, etc.,

Plaintiffs,

vs.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, et al.,

Defendants.

ORDER FOR SUMMARY JUDGMENT

This cause having come on regularly to be heard before me on July 9, 1956, pursuant to a Notice of

Motion by the plaintiffs for Summary Judgment based upon the pleadings and upon the Stipulation of Facts on file in the above-entitled matter, George O. Bahrs of the law firm of Roth and Bahrs, appearing as counsel for the plaintiffs, and pursuant to a Motion for Summary Judgment filed by the defendants herein, based upon the Stipulation of Facts entered into between the parties and filed in this action, and upon the pleadings, papers, records, documents, and files in this action, Robert W. Gilbert and Louis A. Nissen of the law firm of Gilbert, Nissen & Irvin, appearing as counsel for the defendants herein, and the Court being fully advised in the premises and having issued a Memorandum Order which was filed on August 20, 1956, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiffs' Motion for Summary Judgment shall be and hereby is denied;

It Is Further Ordered, Adjudged and Decreed the defendants' Motion for Summary Judgment shall be and hereby is granted, and that the plaintiffs' complaint shall be and is hereby dismissed and summary judgment is hereby granted in favor of each and all of the defendants herein so that plaintiffs shall take nothing by their action, and

It Is Further Ordered, Adjudged and Decreed the plaintiffs shall bear their own costs of suit and the defendants are hereby awarded and the plaintiffs are hereby ordered to pay the defendants their costs of suit.

Dated this 27th day of September, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Affidavit of service by mail attached.

[Endorsed]: Filed September 27, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that plaintiffs above named hereby appeal to the United States Court of Appeals for the Ninth Circuit from the summary judgment denying an injunction entered in this action on September 27, 1956.

ROTH AND BAHRS,

By /s/ GEORGE O. BAHRS.

[Endorsed]: Filed October 2, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case

and constitute the record on appeal herein as designated by the attorneys for the appellant; and for the appellees:

Excerpt from Docket Entries.
Complaint.
Answer.
Notice by Defendants and Motion for Summary Judgment.
Memorandum of Defendant in Support of Motion for Summary Judgment.
Stipulation of Facts.
Memorandum Order of Court for Judgment.
Order for Summary Judgment.
Notice of Appeal.
Appeal Bond.
Appellants' Designation of Record on Appeal.
Statement of Points by Appellants.
Appellees' Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of November, 1956.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the supplemental record on appeal herein as designated by the attorneys for the appellants:

Notice and Motion of Plaintiff for Summary Judgment.

Designation of Supplemental Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of November, 1956.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ MARGARET P. BLAIR,
Deputy.

[Endorsed]: No. 15355. United States Court of Appeals for the Ninth Circuit. Sheet Metal Contractors Association of San Francisco, a Corporation, et al., Appellants, vs. Sheet Metal Workers' International Association, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: November 7, 1956.

Docketed: November 8, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 15355

SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, a California Corporation, et al., Appellants,

vs.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, et al., Appellees.

STATEMENT OF POINTS RELIED UPON ON APPEAL

The points upon which appellants intend to rely in this appeal are as follows:

1. The Court erred in granting defendants' motion for summary judgment.

2. The Court erred in denying plaintiffs' motion for summary judgment.

3. The Court erred in failing to hold that payments by appellant employers into the Joint Industry Board fund, as set forth in paragraph 11 of the Stipulation of Facts herein, constituted payments of money or other thing of value by employers to a representative of their employees who are employed in an industry affecting commerce.

ROTH AND BAHRS,

By /s/ GEORGE O. BAHRS,
Attorneys for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed November 14, 1956.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957
No. 656

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, *et al.*,

Petitioners,

vs.

SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, a Corporation, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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and
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IN THE

Supreme Court of the United States

October Term, 1957

No. .....

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, *et al.*,

Petitioners,

vs.

SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, a Corporation, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Sheet Metal Workers International Association; Local Union No. 104 of Sheet Metal Workers International Association; Local Union No. 75 of Sheet Metal Workers International Association; Joint Industry Board of the Heating & Sheet Metal Industry of Marin, Sonoma, Mendocino, Lake, Napa and Solano Counties, California; and W. R. White, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 16, 1957, and reversing a summary judgment of the United States District Court for the Northern District of California, Southern Division, in favor of said petitioners.

Opinions Below.

The memorandum decision of the United States District Court for the Northern District of California, Southern Division [R. 42-48], printed as Appendix A hereto, *infra*, is reported in 145 Fed. Supp. 626 and also unofficially reported in 38 L.R.R.M. 2597 and 31 C.C.H. Labor Cases, Par. No. 70,174.

The opinion of the United States Court of Appeals for the Ninth Circuit [R. 57-71], printed together with the judgment as Appendix B hereto, *infra*, is unofficially reported in 40 L.R.R.M. 2627 and 33 C.C.H. Labor Cases, Par. No. 70,969.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 16, 1957 [R. 72]. A timely petition for rehearing was denied on November 5, 1957 [R. 73]. On November 8, 1957, the order of the Court of Appeals was entered staying the issuance of its mandate pending the filing, consideration and disposition by this Supreme Court of the within petition for a writ of certiorari, provided that the same has been filed on or before December 14, 1957.

The jurisdiction of this Court to review the instant case is invoked under 28 U. S. C., Sec. 1254(1).

Questions Presented.

1. Whether Section 302 of the Labor Management Relations Act, 1947 (29 U. S. C., Sec. 186) prohibits all monetary payments by employers to a labor-management trust fund established by collective bargaining and created under a written trust agreement for such lawful

purposes as aiding in settlement of labor relations disputes, providing joint labor arbitration machinery, supervising and administering a joint apprenticeship program, providing a forum for discussion of industry problems, promoting cooperation with various public and quasi-public bodies regarding beneficial legislation and other matters of interest in the industry, whenever such fund is jointly-controlled and administered by a board of trustees composed of two distinct groups of union-appointed and employer-appointed members with equal voting strength?

2. Whether Section 302 of the Labor Management Relations Act, 1947 (29 U. S. C., Sec. 186) prohibits all monetary payments by employers to any jointly-controlled labor-management trust fund which does not meet all the requirements necessary to come within the specific exceptions stated in subdivision c(5) of that section?

3. Whether a joint industry board which is composed of an equal number of union-appointed and employer-appointed members and which aids in the settlement of labor relations disputes through conciliation, mediation, and voluntary labor arbitration among its specified functions constitutes a "labor organization" within the meaning of Section 2(5) of the National Labor Relations Act, as amended (29 U. S. C., Sec. 152(5)) so as to be deemed a "representative" of employees within the meaning of Section 302 of the Labor Management Relations Act, 1947 (29 U. S. C., Sec. 186)?

4. Whether Section 302(e) of the Labor Management Relations Act, 1947 (29 U. S. C., Sec. 186(e)) authorizes injunctive relief in favor of particular employers and against particular labor organizations in the ab-

sence of any showing that the latter received, accepted, solicited or compelled any payments or deliveries by the former which are prohibited by that section of said Act?

Statutory Provisions Involved.

Section 302 of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., Sec. 186.

Section 501(3) of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., Sec. 142(3).

Section 2(4) of the National Labor Relations Act, as amended, 29 U. S. C., Sec. 152(4).

Section 2(5) of the National Labor Relations Act, as amended, 29 U. S. C., Sec. 152(5).

The foregoing statutory provisions involved in this case are printed as Appendix C hereto, *infra*.

Statement of the Case.

On January 19, 1956, a complaint was filed against petitioners in the District Court [R. 3-11] by the San Francisco Sheet Metal Contractors Association and all 28 of its employer members, respondents herein, seeking to invoke the statutory jurisdiction conferred upon the District Court by 29 U. S. C., Sec. 186(e) to restrain violations of Section 302 of the Labor Management Relations Act, 1947 (29 U. S. C., Sec. 186, subds. (a) and (b)).

1. The Stipulated Factual Situation.

As revealed by the pleadings [R. 3-15] and the stipulation of facts entered into between the parties [R. 16-41] for consideration by the District Court in ruling upon cross-motions for summary judgment [R. 15-16 and 42], the circumstances giving rise to this case were as follows:

(1) Respondent Association is composed of employers engaged in the sheet metal business in the City and County of San Francisco, California, whose employees are members of San Francisco Local No. 104 affiliated with the Sheet Metal Workers International Association, both petitioners herein.

(2) Under the standard form of union agreement between the San Francisco contractors association and Local No. 104, sheet metal workers sent by the employer to perform work within the geographical jurisdiction of a sister local union are entitled to receive no less than the established wage scale and working conditions of the sister local union in whose jurisdiction they are employed.

(3) Between July 1, 1955 and June 22, 1956, eight of the respondent San Francisco employers carried on jobs or contracts in the six nearby counties, North of San Francisco. Their employees were members of petitioner Sheet Metal Workers Local No. 104, but were working within the geographical jurisdiction of petitioner Sheet Metal Workers Local No. 75 of Vallejo, California.

(4) Under the then-existing wage scales and working conditions established by the collective bargaining agreement between Local No. 75 and the Associated Heating and Sheet Metal Contractors, Inc., an association of employers doing business in the six nearby northern counties, each employer was obligated to contribute to a "Joint Industry Board Fund" the sum of 2½¢ an hour for each hour worked by their employees and any "disputes" arising out of that agreement were to be referred to the "Joint Industry Board" for settlement.

(5) The said Joint Industry Board, composed of an equal number of employer-appointed and union-appointed trustees, was created pursuant to a written trust agreement between Local No. 75 and the northern counties employer association, in order to carry out the following specific purposes—

(a) to administer the trust fund;

(b) to aid in settlement of labor relations disputes;

(c) to provide joint labor arbitration machinery;

(d) to supervise and administer a joint apprenticeship program;

(e) to provide a forum for discussion of industry problems;

(f) to promote cooperation with various public and quasi-public bodies regarding beneficial legislation and other matters of legitimate interest in the industry.

(6) Between October 13 and December 15, 1955, Local No. 75 "threatened to encourage, cause and induce" the Local 104 members employed by the eight San Francisco contractors in the six northern counties to quit work, unless these employers observed the locally-established wage scales and working conditions by making the regular 2½¢ per hour contributions to the Joint Industry Board Fund. Thereafter, these eight respondent employers began making regular contributions to the joint trust fund and continued to do so at least until June, 1956.

2. The Decisions of the Courts Below.

Based upon these undisputed facts, the District Court granted summary judgment in favor of the petitioners herein. It held that the payments which the eight San Francisco employers made to the Joint Industry Board trust fund were not paid to or received by any "representative" of their employees within the meaning of Section 302 of the Taft-Hartley Act. [R. 42-50, reprinted as App. A, *infra.*]

After reviewing that judgment on appeal taken by respondents pursuant to 28 U. S. C., Sec. 1291, the Court of Appeals reversed the determination of the District Court, stating its legal conclusions that—

> "these payments to the Joint Industry Board Fund were unlawful under subdivisions (a) and (b) of §302 (29 U. S. C. 186(a) and (b)), and that the allegations of the complaint, plus the stipulation of the parties, set forth facts sufficient to entitle the plaintiffs to an injunction against further demand."

In its opinion [R. 57-71, reprinted as App. B, *infra*] written by Circuit Judge Pope and concurred in by Circuit Judges Denman and Barnes, the Court of Appeals for the Ninth Circuit rejected the interpretation of the term "representative" in Section 302 adopted in 1954 by the Third Circuit (*United Marine Division v. Essex Transportation Co.* (C. A. 3), 216 F. 2d 410, reprinted as App. D, *infra*). The *Essex* case had been relied upon by the District Court herein as supporting the view that a joint board of trustees administering a labor-management trust fund chosen half by employers and half by the union is *not* such an employee "representative."

To reach its contrary conclusion that such a bipartite board of trustees was a "mere adjunct of the union" in this case, the Ninth Circuit Court construed the language of this Supreme Court in *United States v. Ryan,* 350 U. S. 299 at page 304 as having "brushed away all such narrow notions of the meaning of the term 'representative' as that used in Essex." It specifically ruled in this case that "the Joint Industry Board was a labor organization" within the meaning of Section 2(5) of the National Labor Relations Act, as amended, and "hence a 'representative' of plaintiff's employees within the meaning of subdivision 4." (29 U. S. C., Sec. 152, subds. (4) and (5).) Since these definitions apply with equal force and effect wherever those terms are used in the Taft-Hartley Act (29 U. S. C., Sec. 142(3)), it followed that the Joint Industry Board was deemed to be a "representative" under Section 302.

The Ninth Circuit Court in this case, also concluded, contrary to the Third Circuit Court in the *Essex* case, *supra*, that Section 302 prohibits payments to a jointly-controlled labor-management trust fund unless it has "satisfied the exception to the general language of §302 which is set forth in subdivision 5 permitting the payment of money into trust funds established for the sole and exclusive benefit of employees and their families for medical or hospital care, pensions, compensation for injuries or illness and the like." (29 U. S. C., Sec. 186(c)(5).)

Reasons for Granting the Writ.

1. The Instant Decision by the Ninth Circuit Court of Appeals Adopts an Interpretation of Section 302 Which Directly Conflicts With That of the Third Circuit Court of Appeals.

Since the passage of the Taft-Hartley Act in 1947, there have been only four reported decisions dealing with the question of law as to whether a joint board of trustees of a labor-management trust fund is a "representative" of employees within the meaning of Section 302(a) and (b) of that statute.

In 1948, the United States District Court for the Eastern District of Missouri held that payments by an employer to a labor health institute controlled by a board of trustees with a labor union head as president and a union business agent as secretary-treasurer was "not a representative of any employee of any employer" within the meaning of Section 302. (*Rice-Stix Dry Goods Co. v. St. Louis Labor Health Institute*, 22 L. R. R. M. 2528.)

In 1954, the Third Circuit Court of Appeals held that an agreement for payment of funds by an employer to six trustees of a pension fund, chosen half by employers and half by the union, was not an agreement to pay funds to "any representative of any of his employees" prohibited by Section 302. (*United Marine Division v. Essex Transportation Co.*, 216 F. 2d 410, printed as App. D hereto.)

When the present case arose early in 1956, District Judge Murphy of the United States District Court for the Northern District of California concluded that "the rationale of the Essex case seems to be equally applicable here," but the Ninth Circuit Court of Appeals reversed

the trial court, declaring that the *Essex* case "gave too narrow and restricted a meaning to the term 'representative.'"

While the Ninth Circuit decision seeks to avoid conflict with the concept of "representative" in the Third Circuit by suggesting that it "may well be mere dictum" [R. 69], the *Essex* case actually involved an ***oral agreement*** as distinguished from the "written agreement with the employer" mentioned in the statute. The Third Circuit decision necessarily "recognized that the provision in subdivision (c)(5) of §302, excepting trust funds, was not applicable." (See *Annotation: Labor Management Relations Act—Sec. 302,* 100 L. Ed. 343, 345.)

In rejecting the view expressed in the Third Circuit that "trustees of a fund" are for that reason not representatives of employees within the meaning of the Act, the Ninth Circuit Court declared in the instant case that "a mere reading of §302 demonstrates the fallacy of any such proposition." It stressed that the exception contained in Section 302(c)(5) not only requires that "there are trustees of a fund" but in addition "the fund must be subject to all the detailed limitations there stated." [R. 60.]

The necessity for settlement of this conflict between these two divergent interpretations of Section 302 by this Court is apparent in view of the importance of the questions presented in the administration of the Taft-Hartley Act; the existing state of confusion as to the intent and scope of Section 302, and the adverse effect which a continuation of such uncertainty will have upon numerous joint labor-management trust funds throughout the entire United States whose validity has been placed in doubt. (See discussion, *infra.*)

2. The Instant Decision by the Ninth Circuit Court of Appeals Has Misconstrued and Misapplied the Opinion of This Supreme Court in the Ryan Case.

Although the opinion below written by Circuit Judge Pope cites and quotes from the unanimous opinion of Mr. Justice Clark in *United States v. Ryan*, 350 U. S. 299 [R. 63, 67, 69 and 70], it fails to give effect to the determinations made by this Court in *Ryan* which emphasized the necessity for duly regarding "the precise words of the statute," "their literal meaning," "the legislative history" and "the structure of the section." (350 U. S. at pp. 302 and 305.)

While the *Ryan* case rejected a "narrow construction" of Section 302 that "would frustrate the primary intent of Congress" by restricting the term "representative" to mean only the "exclusive bargaining representative,' (350 U. S. at p. 304)" it did not hold that Section 302 could be "stretched to cases not covered, merely because it may seem to a court that Congress would have done well to cover them." (*Ventimiglia v. United States*, 242 F. 2d 620 (C. A. 4th), decided March 11, 1957.)

As the Fourth Circuit Court so aptly put it in the last-cited case which was decided shortly after the *Ryan* opinion came down:

> "Even when the court may feel that if the omission had been called to the attention of Congress, it might have written the statute differently to cover the omitted case; the court is not empowered to exercise the task of revision."

While holding that Congress "placed the identical limitations on both individuals and organizations by terming both 'representative' of employees in §2(4)" of the Na-

tional Labor Relations Act, the *Ryan* decision made it plain that "in using the term 'representative' Congress intended to include any person *authorized by the employees to act for them in dealings with their employers.*" (350 U. S. at p. 302; emphasis added; also at p. 306.) In refusing to adopt an interpretation of Section 302 by which "payments made directly to union officials or to other individuals as trustees, would apparently be excluded from Section 302" (350 U. S. at p. 304), this Court expressly reserved decision on "whether any official of a union is ex officio a representative of employees under §302." (350 U. S. at p. 301.)

Certainly, this Court did not lend any support in *Ryan* to the conclusion of the Ninth Circuit Court in this case that Section 302 was intended by Congress to forbid all payments of any kind to all types of jointly-controlled labor-management trust funds not expressly permitted by Section 302(c)(5), however socially desirable their purposes might be and however carefully audited and honestly administered they might be. As explained by the *Ryan* opinion, the "primary intent of Congress" in adopting Section 302 was to place "explicit limitations on welfare funds" because "Congress was disturbed by the demands of certain unions that the employers contribute to 'welfare funds' which were in the sole control of the union or its officers and could be used as the individual officers saw fit." In addition to the "welfare fund" limitations of Section 302(c)(5), *Ryan* points out that Congress also adopted a "broad prohibition" in Section 302(a) and (b) to deal with what Senator Taft called "a case where the union representative is shaking down the employer." (350 U. S. at pp. 304-306.)

The House version of the 1947 national labor legislation would have prohibited an employer from assisting any labor organization financially "through making payments of any kind . . . to any fund or trust in respect of the management of which, or the disbursements from which, such organization can, either alone or in conjunction with any other person, exercise any control, directly or indirectly." (H. R. 3020, 80th Cong., 1st Sess., Sec. 8(a)(2), partially quoted in *Ryan*, 350 U. S. at p. 305.) As passed by the Senate, Section 302 of this bill contained a special definition of the term "representative" which included "any organization or fund of which some of the officers are representatives or are members of a labor organization or are elected or appointed by a representative." (Sec. 302(g) of the Senate version, 93 Cong. Rec. 4677, partially quoted in footnote 6 of the *Ryan* opinion, 350 U. S. at p. 306.)

The decision of the Ninth Circuit Court in the present case apparently construed references in *Ryan* to *"minor clarifying changes"* when discussing the legislative history of Section 302 as meaning that no change at all was made when the Joint Conference Committee substituted the definition of the term "representatives" in the National Labor Relations Act as amended for the special definition passed by the Senate (350 U. S. at p. 306, citing Sec. 501(3) and House Conf. Report, No. 510, 80th Cong., 1st Sess., p. 67).

Nothing in the *Ryan* decision authorized the result reached by the Ninth Circuit Court in the present case which, in effect, stretches the statutory definition of "representatives" in Section 2(4) of the National Labor Relations Act as amended (29 U. S. C., Sec. 152(4))

by an unwarranted judicial construction of the term "labor organization" as defined by Section 2(5) of that Act (29 U. S. C., Sec. 152(5)), so as to bring a jointly-controlled labor-management trust fund such as the petitioner Joint Industry Board within the purview of both subsections.

The legislative history of Section 302 was quoted at length in the *Essex* opinion to demonstrate that this section was not intended to outlaw "legitimate trust funds," but rather to make sure "that they shall not degenerate into bribes" or "a war chest for the particular union" or a "fund to be controlled exclusively by the labor union." Section 302 was said in a later case to be designed to "curb adequately the evils of extortion and bribery" and "avoid transactions which may give rise to conflict of interests between the employer and employee representation." (*United States v. Connelly*, 129 Fed. Supp. 786 (D. C. Minn., 1955).) The language of Section 302 itself was also said in another case to be "very deliberately intended to prevent kickbacks, prevent bribes, prevent things that make for labor racketeering." (*Dunbar Co. v. Painters and Glaziers District Council No. 51*, 129 Fed. Supp. 417 (D. C. Dist. Col., 1955).)

While the Ninth Circuit Court emphasizes that "the Essex Transportation Co. case was decided before the decision of the Supreme Court in United States v. Ryan, supra" [R. 69], the *Ryan* decision did not deal with payments to a legitimate trust fund jointly controlled by the appointees of an employer association and a labor union. This Court should make clear whether its *Ryan* opinion can properly be interpreted to justify an application of Section 302 to a fact situation which, in the

words of the *Essex* opinion, is "outside the evil which the Congress was endeavoring to erase" and can be relied upon to "void this type of arrangement which has met with legislative sanction, judicial approval, and is a growing trend in employer-employee relations."

3. The Questions Presented Herein Are of Great Importance in the Administration of the Federal Labor Relations Laws.

This Court has recognized that Section 302 is a "highly specialized restriction on the legality of employers' agreements to make payments to employee representatives." (*Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U. S. 437, fn. 2 of opinion.)

On December 10, 1948, the Solicitor of the United States Department of Labor rendered a memorandum opinion to the Secretary of Labor, commenting upon "the limited meaning of the term indicated by the legislative history" in these words—

> "In using the term 'representative' in section 302, it is of course, clear that Congress had unions or union agents foremost in mind." (Quoted in *Report of the Joint Committee on Labor-Management Relations*, S. Rept. No. 986, Pt. 3, 80th Cong., 2nd Sess., p. 109.)

This opinion was concurred in by the Attorney General on December 13, 1948. (*Ibid.*, p. 97.)

These legal opinions of the Labor Department and the Justice Department and the 1948 decision of the United States District Court for the Eastern District of Missouri in the *Rice-Stix* case, *supra*, 22 L. R. R. M. 2528, were called to the attention of the Congress in a final report

by the Joint Committee on Labor-Management Relations created by the Taft-Hartley Act. Noting that the view had been taken administratively and judicially that "no portion of section 302 applies" where the parties to a "trust fund established by collective bargaining agreement" arrange for payments to trustees selected by them, "because the payments are not being made to a representative of the employees," the Joint Committee recommended that "serious consideration should be given by Congress to an amendment" containing "clear and unmistakable language to the effect that no money may be paid to any trust fund which is the subject of collective bargaining except in accordance with the limitations enumerated in section 302(c)(5)." (*Ibid.*, pp. 97-99.)

Since March of 1949, when the Joint Committee on Labor-Management Relations created by the Taft-Hartley Act went out of existence, various Congressional committees have conducted further studies of legislation relating to trust funds established through collective bargaining and a number of bills have been introduced on the subject without being adopted.

On July 20, 1955, Rex A. Collings, Jr., then Chief of the General Crime Section of the United States Department of Justice testified before the Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Welfare, regarding the interpretation of Section 302. Mr. Collings there rendered the opinion that "Section 302 only prohibits payments by an employer to representatives of his employees which do not fall within certain exceptions. It does not prohibit payments to others," citing the *Rice-Stix* decision, *supra*,

22 L. R. R. M. 2528 and the *Essex* decision, *supra*, 216 F. 2d 410 as authority. He also stated that—

> "There is some doubt that the section prohibits payments to a board of trustees composed of representatives both of employer and employees, even if not set up for a purpose permitted by the section. . . . In our opinion section 302(c)(5) is not a penal clause. It does not of itself make any act or omission a criminal offense." (*Hearings on Welfare & Pension Plan Investigation*, 84th Cong., 2nd Sess., pp. 902-904.)

The final report of the Subcommittee on Welfare and Pension Funds submitted to the Senate Committee on Labor and Public Welfare on April 6, 1956, mentioned at page 78 that the Congress had still not taken action on proposals by which the "prohibitions already in parts (a) and (b) of section 302, making unlawful payments by an employer to a representative of his employees, and the receipt of such payments by a representative [would] have been enlarged to preclude payments to, or receipt by, any fund of which the representative is an officer, director, trustee or administrator."

During 1956, the Permanent Subcommittee on Investigations of the Senate Government Operations Committee under the chairmanship of Senator McClellan of Arkansas began a study of alleged criminal and corrupt practices with respect to the administration of certain particular welfare funds established through collective bargaining and other related matters.

On January 30, 1957, the Senate established a Select Committee to Investigate Improper Practices in the Field of Labor and Management, also under the chairmanship of Senator McClellan, which has been conducting hear-

ings relating to charges of maladministration of certain particular welfare funds and other forms of labor relations "racketeering."

It thus appears quite clear that the settlement of the questions presented herein regarding the proper interpretation and application of Section 302 of the Taft-Hartley Act is in the public interest and would be of tremendous importance in eliminating the existing uncertainties which have arisen in the administration of this Federal law because of the conflict between the instant decision in the Ninth Circuit and the *Essex* decision in the Third Circuit.

4. The Validity of Numerous Legitimate Trust Funds Created Through Collective Bargaining, for Administration of Joint Labor-Management Programs for Apprenticeship Training, Disputes Settlement and Voluntary Arbitration, Industrial Safety and the Like, Has Been Placed in Doubt by the Instant Decision of the Ninth Circuit Court of Appeals.

Although other courts have consistently recognized that joint labor-management trust funds which are properly administered for legitimate purposes are a "social device to be encouraged" (*United Marine Division v. Essex Transportation Co., supra; Upholsterers' International Union v. Leathercraft Furniture Co.*, 82 Fed. Supp. 570 (D. C. Pa., 1949); *Van Horn v. Lewis*, 79 Fed. Supp. 541 (D. C. Dist. Col., 1938); *United Garment Workers v. Jacob Reed's Sons*, 83 Fed. Supp. 49 (D. C. Pa., 1949), the result reached by the Court of Appeals below in this case definitely implies that all jointly-controlled labor-management trust funds not falling within the exceptions provided by Section 302(c)(5) are deemed illegal *per se*. (There was no evidence nor was any

contention made in this case that the establishment and administration of the Joint Industry Board Trust Fund involved any improper practices which were actually or even potentially harmful to honest labor-management relations or in any way inimical to the public welfare.)

The Congress of the United States has specifically adopted legislation for the purpose of fostering the creation of joint labor-management machinery for apprenticeship training. (See Public Law 308, 75th Cong.; 50 Stats. 664-665, 29 U. S. C., Secs. 50-50b.) To carry out these functions the Apprentice-Training service was established in the United States Department of Labor and a Federal Committee on Apprenticeship was appointed. With Federal assistance, the various State governments have likewise adopted legislation to promote the development of "joint apprenticeship committees" through mutual cooperation between employers or employer associations and labor organizations. In countless instances, these joint apprenticeship programs are financed through funds administered by employer-union boards or committees.

Congress has also taken steps to encourage the development of voluntary private machinery for the conciliation, meditation and arbitration of labor disputes. Thus, Section 201 of Title II of the Labor Management Relations Act, 1947 (29 U. S. C., Sec. 171) declares it to be the "policy of the United States" to "encourage employers and the representatives of their employees . . . to make all reasonable efforts to settle their differences . . . by such methods as may be provided for in any applicable agreement for the settlement of disputes"; and to furnish governmental assistance "in formulating for

inclusion in such agreements provision . . . for the final adjustment of grievances or questions regarding the application or interpretation of such agreements and other provisions designed to prevent the subsequent arising of such controversies."

Section 203 of that same Title of the 1947 Act (29 U. S. C., Sec. 173(d)) similarly states that "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." (The Senate version of the Act not only authorized the Federal Mediation Service to induce the parties to submit such disputes to voluntary arbitration but provided for payment by the United States of up to $500 as a contribution to defray the cost of such an arbitration. This financial contribution feature was eliminated in conference. See House Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 62; S. Rept. No. 105, 80th Cong., 1st Sess., p. 29.) Numerous disputes settlement boards have been established under trust fund arrangements in the last decade.

Although the growing trend in employer-employee relations toward the development of bi-partite boards or committees as a means of promoting industrial peace and labor-management cooperation has resulted in the establishment of numerous joint organizations of this type in countless industries throughout the United States, financed through jointly-controlled trust funds, the instant

decision of the Ninth Circuit Court has raised serious questions as to the legality of these plans.

Because doubt has been cast on the legality of employer payments to jointly-administered apprenticeship and training programs in the building and construction industry, and the specific question has arisen whether the joint trustees of a fund created to administer such a program may be declared to be "representatives" of employees within the meaning of Section 302, the Secretary of Labor has sent to the Congress a proposed amendment which would make it clear that employer payments to such trust funds are not prohibited by Section 302. (S. 1614, 85th Cong., 1st Sess. See also comment at 39 Labor Relations Reporter 361.)

The question presented herein are extremely significant to a great number of employers and labor unions throughout the United States already participating in joint industry boards, joint trade committees, joint apprenticeship programs, joint industrial safety plans, and the like and to the numerous individuals who serve as trustees of the trust funds created to administer these programs. The importance of securing a determination by this Court of the questions raised is underscored by the fact that any employer who makes a payment found to be prohibited by Section 302 or agrees to do so and any "representative of any employees" who receives or accepts any such payment or agrees to do so, is subject to criminal penalties (29 U. S. C., Sec. 186(d)) as well as injunctive restraint (29 U. S. C., Sec. 186(e)) under the Act.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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and

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APPENDIX A.

Memorandum Order.

In the United States District Court for the Northern District of California, Southern Division.

Sheet Metal Contractors Association of San Francisco, a California corporation, *et al.*, Plaintiffs, vs. Sheet Metal Workers International Association, *et al.*, Defendants. No. 35206 Civil.

Filed Aug. 20, 1956.

These are cross motions for summary judgment in an action brought under 29 U. S. C. 186(e) by a number of employers against two labor unions, a parent organization of those two labor unions, a labor official, and a joint industry board.

The action arises out of an agreement between an employers' group known as Associated Heating and Sheet Metal Contractors, Inc., and Local #75 of the Sheet Metal Workers' International Association, providing for the establishment of a "Joint Industry Board", and for the contribution by the employers covered by the agreement of a sum of 2½¢ for each hour worked by the members of the Union for any of the employers, to defray the expenses of the Joint Industry Board. The Board consists of six members for the employers and six members for the union. Decisions of the Board are made by a concurrence of a majority of the employer members with a majority of the union members. A fair reading of the *Trust Agreement of Joint Industry Board*, which governs the relationship of the parties thereto, leads to the conclusion that the power to expend the funds contributed by the employers, resides in the Board,

and is thus dependent upon the approval of the employer members.

The purposes for which the Board is established are not entirely clear. The Trust Agreement must be read in the context of the collective bargaining agreement concluded between the same parties, and which, by cross-references in the two documents, is made the prevailing agreement in case of conflict. Thus read, the functions of the Board would seem to be the establishment and administration of a joint arbitration committee to settle all grievances arising between the parties, or any of them, or any of the members of either of them, whether or not related to the collective bargaining contract; the establishment, supervision and administration of a joint apprenticeship program, including a training program and a program for attracting desirable persons to the industry; "to assist and aid" the industry in maintaining high standards of skill, and to render assistance to employers, unions, and individuals in the industry for the purpose of effectuating high standards in the industry; to carry on publicity and lobbying for the benefit of the industry; and "to supervise, administer and carry out" (*sic*) all funds provided for by the bargaining agreement between the parties, except the Health and Welfare Fund. That fund is separately administered, and seems to be the only fund of substance in the bargaining agreement, other than the fund for the Joint Industry Board, which is the subject of this action.

The claim of plaintiffs is that the payment, pursuant to the "Trust Agreement of Joint Industry Board," of 2½¢ per man-hour to the Joint Industry Board fund violates the prohibition against payments by employers to representatives of their employees contained in 29

U. S. C. 186, commonly known as Section 302 of the Labor Management Relations Act of 1947. The prohibition in question is contained in two provisions which read as follows:

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value." 29 U. S. C. A. Sec. 186(a) and (b).

A preliminary contention by defendants may be simply disposed of. It is that the statute in question cannot apply to this agreement, because the signatory on the employer side is not any *individual* employer of union members, but the *association* of employers which does not itself hire any employees. The purpose of Congress to prevent misuse of funds, and the possibility of the concealment of bribes and extortions in the form of payments by employers to labor representatives, may not be so easily evaded as defendants suggest. The funds in question obviously come from the employers. The fact that the employer association signed the agreement on behalf of the employers, rather than the individual employers, does not change the realities of the situation. The agreement to pay is in fact and law made by the employers.

The question for decision, therefore, is whether this agreement for payments to the Joint Industry Board,

which is composed of six employer and six union members, is an agreement to pay to "any representative of any of his employees" within the meaning of 29 U. S. C. A. 186.

Substantially the same issue was before the court in United Marine Division v. Essex Transportation Co., 216 F. 2d 410 (3d Cir. 1954). The Court there held that an agreement for payment of funds to six trustees, chosen half by employers and half by the union, was not an agreement to pay funds "to any representatives of any of his employees." The Court said:

> "These trustees were not, in our judgment, representatives of the employees. They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. The terms under which they act were carefully spelled out." Id., at 412.

The distinction between the Essex case and the case at bar is the fact that in the Essex case the fund in question was a welfare fund, whereas in the instant case the fund does not include the welfare and pension funds and is subject to expenditure on purposes of a rather large and vague nature. Nevertheless, the rationale of the Essex case seems to be equally applicable here. The Joint Industry Board will hold the funds in question in trust for the purposes enumerated in the Trust Agreement. Those purposes, while in certain cases auxiliary to collective

bargaining procedures, go beyond them and are not confined by the terms of the collective bargaining agreement except in case of conflict. It may be instructive to note what another court has said in answer to an argument similar to that of the employers here, that the Joint Industry Board funds may conceivably be used to defray general union expenses. In Upholsters' International Union v. Leathercraft Furn. Co., 82 F. Supp. 570 (E. D. Pa. 1949), the employers pointed to the possibilities of abuse inherent in a situation where the union representatives were in *sole* control of funds contributed by the employer for health and welfare purposes. The Court said:

> ". . . whenever the trustees use, or attempt to use, directly or indirectly, the fund for a purpose other than for the sole and exclusive benefit of the employee-members, this court, when called upon, will enjoin the trustees from making the improper expenditures. The burdening of the fund with undue administrative expenses or lush salaries for union officials will not be tolerated; . . ." Id., at 573.

The Joint Industry Board is not a part of the union, and its governing agreement expressly provides for the separate character of the Board from either of the parties, and expressly preserves their duties and relationships with respect to each other and each of them with respect to their members. The agreement provides for a careful accounting and separate deposit system for Joint Industry Board funds from those of the union. If the employer members refuse to sanction an expenditure, for any reason, there is a provision for arbitration in the agreement. Under these circumstances, this court cannot hold that

the payments in question are payments "to any representative." The union members of the Joint Industry Board, in that capacity, are not "representatives" of the employees within the meaning of 29 U. S. C. 186.

Plaintiffs' motion for summary judgment is denied, and defendants' motion for summary judgment is granted. Let appropriate orders be prepared.

16 August 1956.

EDWARD P. MURPHY
UNITED STATES DISTRICT JUDGE

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Sheet Metal Contractors Association of San Francisco, a Corporation, *et al.*, Appellants, vs. Sheet Metal Workers International Association, *et al.*, Appellees. No. 15,355.

Filed Sept. 16, 1957.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before Denman, Pope and Barnes, Circuit Judges.

POPE, *Circuit Judge.*

This action was brought by the Sheet Metal Contractors Association of San Francisco and by all 28 members of that association, against the Sheet Metal Workers International Association, Local Unions Nos. 104 and 75 of that association, and the Joint Industry Board of the Heating and Sheet Metal Industry of Marin, Sonoma, Mendocino, Lake, Napa and Solano Counties, California.

The complaint alleged violation and threatened violation of the provisions of subdivisions (a) and (b) of §302 of the Labor Management Relations Act, 1947. (29 U. S. C. A. §186(a) and (b)). The first of these subdivisions makes it unlawful for any employer to pay money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce; the second forbids any such repre-

sentative to receive or accept any such money or thing of value.[1]

The complaint predicated jurisdiction in the court below upon the provisions of subdivision (e) of §302 which recites that district courts shall have jurisdiction to restrain violations of that section.[2]

The members of the plaintiff association are, as the name of the Association indicates, contractors and employers of labor in the sheet metal industry, This multi-employer group was formed for the purpose of collective bargaining with their employees. The latter are members of the defendant Local Union 104 which is the union of the Sheet Metal Workers International Association having jurisdiction of the employees in that industry in the City and County of San Francisco. The association has an agreement, executed on behalf of its members, also plaintiffs here, with Local Union 104 covering rates of pay, rules and working conditions of all employees in the San Francisco area engaged in the defined sheet metal work. The members of the Association occasionally undertake contracts for the performance of sheet metal work in the nearby counties of Marin, Sonoma, Mendo-

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[1] "§186. * * * (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in any industry affecting commerce. (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."

[2] "(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction for cause shown, and subject to the provisions of §381 of Title 28 . . . to restrain violations of this section. . . ."

cino, Lake, Napa and Solano, all north of San Francisco. In the period between July 1, 1955 and June 22, in the following year, eight of the plaintiff employers named undertook to perform jobs or contracts in those northern counties or some of them employing thereon their employees, members of Local 104.

During the same period a similar association of contractors, known as Associated Heating Sheet Metal Contractors, Inc., representing sheet metal contractors doing business in those northern counties other than San Francisco, had a collective bargaining agreement with Local Union No. 75, which was the bargaining representative of their employees. Both the collective bargaining agreement covering the San Francisco employers and employees (the agreement with Local 104) and the collective bargaining agreement covering the employers and employees in the six northern counties (with Local No. 75), were similar in terms, and, in some respects, identical. They were identical in making provision for wage scales and working conditions for employees hired outside of the territory of the local union to perform or supervise work performed within the area covered by the local union's contract. Thus §4 of Article VII in each contract provided as follows: "When sent by the Employer to supervise or perform work specified in Article I of this Agreement outside of the jurisdiction of the Union and within the jurisdiction of another Local Union affiliated with Sheet Metal Workers' International Association, journeymen sheet metal workers covered by this Agreement shall be paid at least the established minimum wage scale specified in Section 1 of this Article, but in no case

less than the established wage scale of the Local Union in whose jurisdiction they are employed, . . ."[3]

It is thus apparent that these collective bargaining agreements contemplated what actually transpired, namely, that occasionally San Francisco employers would take their employees into the other counties named, and there fulfill contracts or jobs in those areas. It will be noted from the language quoted from §2 in the last footnote that employees moving to an area of established higher wage scales would get that higher wage scale. Under the contract of Local 104, for instance, its members working in the area of Local Union 75 would be entitled to the wage scale and working conditions of the latter union.

The complaint relates to what is alleged happens or is threatened will happen to plaintiff employers when they move their work forces into the area of Local Union 75 as contemplated by the standard provisions common to both union contracts. It appears from the complaint, as supplemented by the stipulation of the parties, that the

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[3]§§2 and 3 of the same Article also provided:

"§2. On all work specified in Article I of this Agreement, fabricated and/or assembled within the jurisdiction of this Union, or elsewhere, for erection and/or installation within the jurisdiction of any other Local Union affiliated with Sheet Metal Workers' International Association, whose established wage scale is higher than the wage scale specified in this Agreement, the higher wage scale of the job site Union shall be paid to the journeymen employed on such work in the home shop or sent to the job site.

"§3. Except as provided in Sections 2 and 4 of this Article, the Employer agrees that journeymen sheet metal workers hired outside of the territorial jurisdiction of the Union to perform or supervise work outside the jurisdiction of the Union and within the jurisdiction of another Local Union affiliated with Sheet Metal Workers' International Association, shall receive the wage scale and working conditions of the Local Union in whose jurisdiction such work is performed or supervised."

associated contractors of these six northern counties made and entered into a so-called "trust agreement" with Local Union No. 75 whereby there was set up and established a "Joint Industry Board of Heating and Sheet Metal Industry of Marin, Sonoma, Medocino, Lake, Napa and Solano Counties." As above noted, the Board was named as a defendant.

The agreement establishing the Joint Industry Board, in addition to specifying the purposes of the agreement, the functions of the Board, the mode of selection of the Board and its officers, and the manner in which the Board should act, was keyed into the collective bargaining agreement of Local No. 75 through addenda thereto which provided among other things that any disputes arising out of this latter agreement should be referred to the Joint Industry Board; that the provisions for settling of disputes under the collective bargaining agreement should be those stated in the so-called trust agreement. The addenda further recited that each employer should contribute to the Joint Industry Board Fund the sum of 2½ cents per hour worked by all journeymen and apprentices who were employed on the work described in the union agreement. The trust agreement was expressly made a part of the union agreement.

When the eight plaintiff employers above mentioned took their employees to the jobs in the six northern counties, demands were made upon them that they pay the 2½ cents an hour for every hour worked by each of their employees performing work in those counties. The gist of the complaint is that "defendants are attempting to cause and compel plaintiffs to pay and deliver money and other things of value to defendant Joint Industry Board," and will, unless restrained by the court, "cause

the aforesaid employees of plaintiffs to strike and cease working" unless such money be paid. It is alleged that pursuant to and in compliance with the demands and threats of defendants, the eight plaintiff employers mentioned have paid certain sums listed in the complaint to the Joint Industry Board. It was stipulated that defendant Local 75 threatened to cause and induce the employees of these plaintiffs to strike and refuse to perform services in those counties unless the 2½ cents per hour were paid; and that thereafter those plaintiff employers did pay such sums into the Joint Industry Board Fund.

It is plaintiffs' claim that these payments thus induced constituted payments of money to a representative of the plaintiffs' employees made unlawful by subdivision (a) of §302, and that such representative thereby accepted such money in violation of subdivision (b). In consequence, the plaintiffs, appellants here, say that they are entitled to an injunction to restrain such violations of §302 under the provisions of subdivision (e).

Both plaintiffs and defendants moved for summary judgment based upon the pleadings and the stipulation of facts above mentioned. The motion of the defendants was granted and summary judgment entered for them. This appeal followed. That judgment was based upon the court's determination disclosed in its memorandum opinion that, upon the facts disclosed, the Joint Industry Board, or the union members thereof, were not representatives of the employees within the meaning of §302. A consideration of the merits of the appeal calls for a review of that determination.

Before entering upon the merits of the case we must inquire as to our jurisdiction and that of the trial court to

entertain the cause. The allegation of the complaint designed to disclose jurisdiction is as follows: "Plaintiffs are engaged in an industry affecting commerce within this district and plaintiffs are employers of employees engaged in an industry affecting commerce within the meaning of §302, LMRA 1947." The stipulation of facts recites as follows: "During the calendar year 1955 plaintiff employers collectively made direct purchases of goods and materials from outside the State of California of value in excess of $500,000; and that plaintiff employers collectively made purchases in California through local dealers of goods and materials originating outside the State of California of a value in excess of $1,000,000; and plaintiffs collectively rendered services and furnished materials outside the State of California having a value of approximately $125,000." This, it will be noted, refers to all 28 employer plaintiffs. There is no separate stipulation or allegation as to the quantity of purchases or sales of goods or materials or of services rendered and materials furnished outside the State of California by the eight employers who have been compelled to pay the 2½ cents per hour about which complaint is made. It is suggested that for aught that appears here the amount of such interstate commerce of the eight employers may be de minimis; that at any rate there is no allegation which could form a basis for entertaining the suit.

We think that suggestion is without validity here for the reason that the statutory basis of jurisdiction is not directed to the character or form of the business of the employer but is built around a characterization of the employees who have the representative. Subdivision (a) of §302 refers to *any* employer. It is made unlawful for "any employer" to pay money to a representative of

any of his employees, "who are employed in an industry affecting commerce". This is made clear by appropriately italicizing the language of subdivisions (a) and (b) as follows: "(a) It shall be unlawful for *any* employer to pay or deliver, or agree to pay or deliver, any money or other thing of value to any representative of *any of his employees who are employed in an industry affecting commerce.*

"(b) It shall be unlawful for any representative of *any employees who are employed in an industry affecting commerce* to receive or accept, or agree to receive or accept, from the employer of such employees any money or other thing of value."

The statutory test is not as to how much interstate business any particular employers may do. If on the merits it be determined that the Joint Industry Board which received the money from the eight employers was a "representative" of plaintiff's employees, then since those employees bargained with the 28 employers through their Local 104, it would be plain that we would be dealing with payments to a representative of "employees who are employed in an industry affecting commerce." That is all that is required to satisfy these sections of the statute. They are employees in an industry affecting commerce because their union bargains with the entire association of 28 employers.

This construction is consistent with the legislative history of §302 which is set forth in United States v. Ryan, 350 U. S. 299, 305-306. When he dissented from the decision of the Court of Appeals which the Supreme Court reversed in the Ryan case, Judge Learned Hand aptly described the purpose of the legislation by saying,

(United States v. Ryan, 225 F. 2d at p. 426): "Congress wished to prevent employers from tampering with the loyalty of union officials, and disloyal union officials from levying tribute upon employers." The Supreme Court quoted Senator Taft's reference to a "case where the union representative is shaking down the employer." We cannot believe that in an attempt to accomplish this objective Congress intended to provide that the levying of tribute should be prohibited only where the employers were large ones whose volume of interstate business was substantial, but that the union had full liberty to levy tribute upon the smaller employers within the same industry, even though the union officials represented employees who are employed in an industry which, as such, affected commerce.[4] We are of the opinion that such an interpretation of the statute would frustrate its purposes which, as stated in the Ryan case were broad and inclusive. We hold that there was jurisdiction in the trial court to entertain the suit and to pass upon its merits.

As we have noted, the trial court was of the view that the Joint Industry Board was not a "representative of any employees" within the meaning of §302. Whether that conclusion was correct is the primary question now before us. We think the answer is to be found in the language of the "trust agreement" itself and the contracts of the Unions and their references to each other and to the Joint Industry Board.

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[4]As noted in the Ryan case, supra, the enactment of the section was prompted in part by the report of demands made the preceding year by the United Mine Workers for a tax of 10 cents per ton on coal to be paid to the Union. See Legislative History, L. R. R. A. 1947, p. 458, et seq. It is not conceivable that Congress meant to prohibit such exactions from mine operators shipping interstate, while permitting them from others doing only intrastate business.

The purposes of the Board as expressed in the so-called Trust Agreement are quoted in full in the margin.[5] The Board was: 1, to administer the fund; 2, to aid in settlement of disputes between the union and the employers' association; 3, to set up a joint arbitration committee; 4, to supervise and administer an apprenticeship program; 5, to provide a forum for discussion of the problems of the industry; and 6, to cooperate with the public and quasi-public bodies with regard to legislation and other matters of interest to the industry. None of the provisions of the joint agreement were such as to bring the payments made to the Joint Industry Board within any of the exceptions stated in subdivision (c) of §302, the most important of which permits money to be paid to a trust fund for the exclusive benefit of the employees where such payments are held in trust for the

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[5]"A—Purposes: It shall be the functions of the Joint Board:

1—To supervise, administer and carry out all funds provided for by the Bargaining Agreement, except the Health and Welfare Fund which is administered by the Joint Trustees of the Sheet Metal Workers Health and Welfare Fund of Northern California.

2—To aid in the settlement of any and all disputes of any nature whatsoever which may arise between the Union, its members, agents and or representatives, and the above named association, its members, and all other employers of union members who are signatories to agreements with the union.

3—To set up and administer a joint arbitration committee and to provide further arbitration procedures should the Joint Arbitration Committee be unable to decide or resolve a dispute.

4—to supervise and administer a joint apprenticeship program; to establish Apprenticeship Standards; to attract persons of good moral character, ambition and competency to the industry; and to provide for the training of such persons in order to maintain and continue the high degree of skill and quality of work which now prevails in the Heating and Sheet Metal Industry.

5—To assist and aid the Heating and Sheet Metal Industry in continuing the high degree of skill which it now enjoys; to provide a forum where Management and Labor can discuss ways and means for further co-operation; to counsel and advise and

purpose of paying for medical or hospital care, pensions on retirement or death, or compensation for injuries or illness resulting from occupational activity.[6]

With respect to the makeup and the functioning of the Board and its officers, and the manner in which it was to carry out its assigned duties, the provisions of the trust agreement were somewhat unusual. The Board was made up of six members representing the union and six members representing the employers, but the organic agreement carefully provided against the Board acting as a unit, or its members voting individually or independently.

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render such other assistance to individual members of the Union, and all employers who are signatories hereto, which will aid and facilitate efforts to effectuate high standards in the Industry. It is understood that neither the Union nor Association shall be superseded by the Joint Industry Board as far as the relationship existing between each of them and their respective members; nor do they relinquish their responsibility to their respective members; nor do they relieve their members from the liabilities and obligations such members have to the Union or Association, respectively, under the provisions of the Constitution and By-Laws of each of them, and the same shall continue in full force and effect.

6—To meet with representatives of public and quasi-public bodies or groups and with other groups or associations in the construction Industry or allied fields; to foster, promote and urge beneficial legislation within the State of California relating to the Heating and Sheet Metal Industry, its standards, specifications, improve technological skills or any other matter pertaining thereto; to acquaint the public at large with the work of the Heating and Sheet Metal Industry and to foster good public relations. No action may be taken which knowingly violates the anti-trust and monopoly laws of the United States, the State of California, or any political subdivision thereof. The Joint Industry Board as such will take no active part in any political campaign."

[6]§302(c), (Title 29 §186(c), provides in part: "The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . ." (Added are elaborate qualifying provisos listed as (A), (B) and (C), strictly limiting the use of such funds and the manner in which they may be set up.)

Thus no stated part of the whole number could constitute a quorum but a quorum could exist only if three of the employer members and three of the union members were present. Officers could be elected only by a majority vote of the employer members together with a majority vote of union members and two of the officers must be employers and two union members. A general manager could be appointed only in a similar manner, and his services terminated in like manner through separate majority votes of union and employer groups. All committees were to be constituted in similar manner. It was provided: "The Board shall have the power and authority to study and correct improper working conditions and shall decide all controversies or disputes arising under this agreement. Decision of the Board shall be made by a majority vote of the Union members, together with a majority vote of the Employer members, based on full membership of the Board." Also, the designation of any representative on the Board could be revoked at any time at the pleasure of the party making the appointment

Bearing in mind these provisions of the joint agreement, we proceed to the statutory definition of the term "representative" as used in the applicable section. §142 (3) of Title 29 U. S. C. A., which is new matter added by the Taft-Hartley Act, provides that "The terms . . . representative . . . shall have the same meaning as when used in subchapter II of this chapter as amended by this chapter." This is a reference to the definition in the original Wagner Act which now appears in §152(4) of Title 29 as follows: "The term 'representatives' includes any individual or labor organization." The term "labor organization" is defined in subdivision (5) of the same section as follows: "The term 'labor organization'

means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Referring to the language just quoted, it seems plain enough that the Joint Industry Board was "an organization of any kind." The purposes of the Board, (footnote 5, supra), indicate that it existed for the purpose at least in part of dealing with employers concerning grievances, etc. This is apparent from the addenda to the Local No. 75 agreement which recites that "Any disputes arising out of this agreement shall be referred to the Joint Industry Board." Note particularly the statement of the purpose No. 2 in the above footnote 5, supra: "To aid in the settlement of any and all disputes of any nature whatsoever which may arise between the Union, its members, agents and/or representatives, and the above named association, its members, and all other employers of union members who are signatories to agreements with the union."

Thus we are led to the conclusion that the Joint Industry Board satisfies that part of the above quoted definition of "labor organization" which recites that it is one which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wages, etc.

We next inquire whether the Joint Industry Board was one "in which employees participate" within the meaning of the above quoted subdivision 5 of §152. We assume that for the purposes of this case the employees here re-

ferred to must be the employees of the plaintiffs who are members of Local 104, that is to say, the San Francisco employees.[7] It seems plain that this portion of the definition can be satisfied by any type of employee participation. It would not be necessary that any individual employee members of Local 104 be members of the Joint Industry Board trustees, or even that they participate in electing such trustees, but that if a Union which at any time or for any purpose represents those Local 104 members also participates in the Joint Industry Board, then it can be said that the Board is an organization in which employees participate. The employees participate through the Union that represents them.

In United States v. Ryan, supra, the court pointed out the reasons why the purpose of §302 could only be accomplished through a broad and inclusive reading of the term "representative." It seems to us that for similar reasons the reference to employee participation must be given a broad meaning and that participation by representation would satisfy the meaning of this definition as applied to the problem here presented. Such we think was the clear legislative intent.

Local 75 did participate both in the formation and the operation of Joint Industry Board. The stipulation also recites that between October 13 and December 18, 1955, Local No. 75 threatened to encourage, cause and induce these employees of the plaintiffs who had been taken to

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[7]Subdivision 3 of §152 recites: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer unless this subchapter explicitly states otherwise. . . ." However, this suit concerns the enforcement of the provisions of §302 and its prohibition of payment of money by an employer to a representative of any of his employees.

the jobs in the six northern counties to refrain from performing and to refuse to perform any services in those counties, that is, to go on strike, unless plaintiffs paid the 2½ cents per hour into the Joint Industry Board Fund. When Local 75 took this action it was plainly doing so on behalf of these members of Local 104 temporarily in the northern counties and in respect to the working conditions and wage scales of these 104 members.

We have previously referred to the provisions, identical in the union contracts of both Locals, which provided that when the employers sent their employees into an outside jurisdiction the sheet metal workers shall be paid according to a wage scale "in no case less than the established wage scale of the local union in whose jurisdiction they are employed." These contracts further provide that under those circumstances the employers shall be otherwise governed by the established working conditions of said local union. In other words, the working conditions controlling these traveling 104 members are those established by Local 75. These provisions further recite that in applying them "the term 'wage scale' shall include the value of all applicable hourly contractual benefits in addition to the hourly wage rate provided in said sections." Clearly enough the 2½ cents per hour here referred to is an "applicable hourly contractual" benefit within the meaning of those provisions.

We think that all of this means that when Local 75 made the agreement for the collection of the 2½ cents per hour for the Joint Industry Board, it was making that arrangement not only on behalf of its own members but on behalf of the traveling sheet metal workers of other unions during the time the latter were in Local 75 terri-

tory; that when Local 75 made the deal for the 2½ cents per hour and when it undertook to call a strike of the Local 104 members in respect to the northern counties jobs, Local 75 was participating in the Joint Industry Board on behalf of the plaintiff's employees or some of them. The result is that the Joint Industry Board was a labor organization within the meaning of subdivision 5 of §152 and hence a "representative" of plaintiff's employees within the meaning of subdivision 4.

The trial court's contrary determination that the Joint Industry Board, or the union members thereof, were not representatives of the employees within the meaning of §302, was based upon that court's interpretation of the case of United Marine Division v. Essex Transportation Co., 216 F. 2d 410, (3 cir.). The court quoted the following language from that case: "These trustees were not, in our judgment, representatives of the employees. They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. The terms under which they act were carefully spelled out."

For a number of reasons we think that the decision upon which the trial court relied is not apposite here. In the first place, the quoted language may well be mere dictum for it indicates that the court was dealing with a welfare fund which may well have satisfied the exception to the general language of §302 which is set forth in subdivision 5 permitting the payment of money into

trust funds established for the sole and exclusive benefit of employees and their families for medical or hospital care, pensions, compensation for injuries or illness, and the like. In the second place, the Essex Transportation Co. case was decided before the decision of the Supreme Court in United States v. Ryan, supra.

In the Essex case, it is plain that the language quoted gave too narrow and restricted a meaning to the term "representatives." It is said that the trustees were not representatives of employees because they were trustees of a welfare fund, and were not acting as representatives of either union or employers since they had fiduciary duties in connection with a trust fund. We think that a mere reading of §302 demonstrates the fallacy of any such position. If that section, as Essex suggests, means that "trustees of a fund" are for that reason not representatives within the meaning of the Act, then part 5 of subdivision (c) was wholly unnecessary and all the careful statement of an exception found there would be wholly meaningless. For the exception does not follow from the mere fact that there are trustees of a fund, but the fund must be subject to all the detailed limitations there stated. But the decision in United States v. Ryan brushed away all such narrow notions of the meaning of the term "representatives" as that used in Essex. The court said (p. 304, 350 U. S.): "Further, a narrow reading of the term 'representative' would substantially defeat the congressional purpose. In 1946 Congress was disturbed by the demands of certain unions that the employers contribute to 'welfare funds' which were in the sole control of the union or its officers and could be used as the individual officers saw fit. The United Mine Workers' demand that mine operators create a welfare fund for

the union by contributing 10 cents for each ton of coal mined, caused the Congress to act. The Case Bill H. R. 4908, 79th Cong., 2d Sess., which regulated welfare funds in a manner similar to §302 was enacted in 1946, but was vetoed by the President. The following year the Taft-Hartley Act containing §302 was passed over another veto. But, if 'representative' means only the 'exclusive bargaining representative,' the explicit limitations on welfare funds in §302(c)(5) may be easily evaded. Payments made directly to union officials, or to other individuals as trustees, would apparently be excluded from §302. Thus, a narrow construction would frustrate the primary intent of Congress."

In attempting to defend here the concept of "representative" expressed in the Essex case, appellees undertook to argue that the trustees of the Joint Industry Board represented some independent unit or entity separate and apart from any employees or group of employees; that the Joint Industry Board, or its Fund, was a trust, which constituted such an entity, and that it was as detached and independent of the employees as would be a board of labor conciliation or board of arbitration; or, perhaps, like a volunteer fire department set up by both employers and employees in a company town.

This argument overlooks the special and peculiar provisions of this so-called trust agreement. It is a bit difficult to find that any true trust was here established, but we need not pass upon that question. For the whole agreement repeatedly specified that in all actions taken, the union members of the board were required to act separately, by their own majority, and that they were always and at all times subject to recall or discharge at the will of the union. No action whatever can be taken

and none of the powers specified can be exercised unless decision is made "by a majority vote of union members." This meant that the individual members of the Board could not act independently or exercise an independent judgment or act as representatives of a separate entity or organization. The Board could not take action by a majority vote. Action could be taken only if the union members as such, by a majority of those representing the union, agreed to it. In short, these members, who had to vote in that manner were compelled to take orders from the union. Without a vote taken in that manner the Joint Industry Board could do nothing, and it was to this extent a mere adjunct of the union.[8] It is plain that Local 75 so construed the "trust agreement," for it was the union that forced these plaintiffs to pay the 2½ cents per hour by threat of strike, thus treating the Joint Industry Board as if it were a feature of the union itself.

We conclude that these payments to the Joint Industry Board fund were unlawful under subdivisions (a) and (b) of §302 (29 USCA 186(a) and (b)), and that the allegations of the complaint, plus the stipulations of the parties, set forth facts sufficient to entitle the plaintiffs to an injunction against further demand.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

(Endorsed:) Opinion. Filed Sept. 16, 1957.

Paul P. O'Brien, Clerk.

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[8]Let us suppose that under the addenda to the Local 75 contract a dispute arising under that agreement concerning wage rates being paid the employees brought from San Francisco were referred to the Joint Industry Board, and that after such reference it were proposed that the point made by the employer be conceded. Such concession could only be made by union action through vote of a majority of the union members.

United States Court of Appeals for the Ninth Circuit.

Sheet Metal Contractors Association of San Francisco, a Corporation, et al., Appellants, vs. Sheet Metal Workers International Association, et al., Appellees. No. 15,355.

JUDGMENT.

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court. that the Judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellants, and against the Appellees, and that this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

IT IS FURTHER ORDERED and adjudged by this Court, that the Appellants recover against the Appellees for their costs herein expended and have execution therefor.

(ENDORSED) Judgment

Filed and entered: September 16, 1957

PAUL P. O'BRIEN, Clerk.

APPENDIX C.

Pertinent provisions of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C., Sec. 141 *et seq.*, are as follows:

RESTRICTION ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,*

That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, conmpensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide

such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5) (B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

DEFINITIONS

SEC. 501. When used in this Act—

(3) The terms "commerce," "labor disputes," "employer," "employee," "labor organization," "representative," "person," and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * * * * * * * *

"SEC. 2. When used in this Act—

"(4) The term 'representatives' includes any individual or labor organization.

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

APPENDIX D.

Opinion of the United States Court of Appeals for the Third Circuit.

United Marine Division, ILA, Local 333, AFL, an Unincorporated Association, *et al.*, Plaintiff-Appellants, v. Essex Transportation Company, a Corporation of the State of New Jersey, *et al.*, Defendants-Appellees. No. 11,328.

Filed November 3, 1954.

Appeal from the United States District Court for the District of New Jersey.

Before Maris, Goodrich and Kalodner, Circuit Judges.

C. J. GOODRICH, *Circuit Judge.*

This is an appeal from a judgment for the defendant in a suit brought to compel the payment by the employer of money to a pension trust for employees.[1]

The plaintiff alleges that the defendant company orally agreed to make payments to six trustees of a welfare fund. The defendants say that this oral promise, if it was made, is insufficient to hold them liable for the payments because of a provision in the Labor Management Relations Act of 1947. 28 U. S. C. §141, *et seq.* (1952). The district court was persuaded that this position was correct and ordered judgment for the defendants without submitting to the trier of the fact the question whether the promise to pay was made as alleged. We are, there-

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[1]The suit is brought against both the corporation and the directors thereof, it being alleged that the corporation has been dissolved and its assets distributed to shareholders by the directors who are, it is alleged, liable under New Jersey law to creditors for the amount so distributed. See N. J. Stat. Anno. §§14:13-1 *et seq.* (1939).

fore, confronted at this point with a question of law solely and this question involves the interpretation of Section 186(c)(5)(B) of the statute referred to.

The two provisions to which we must give attention are as follows:

> "(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce..
>
> "(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value." 28 U. S. C. §186(a) and (b) (1952).[2].

It is undisputed that at the time of the alleged oral agreement there was a welfare fund set up which was operated by six trustees, three of whom were chosen by the plaintiff union and three by the Marine Towing and Transportation Employers' Association. This fund was set up by an agreement in writing and the trustees had

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[2]We do not get much help from the definition which the Act gives of representatives and labor organizations. They read as follows: Section 152 of the Act, Definitions, subdivision (4) reads: "The term 'representatives' includes any individual or labor organization." 28 U. S. C. §152(4) (1952). Subdivision (5) of the same section defines labor organization:

"The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." 28 U. S. C. §152(5) (1952).

also established, through an agreement in writing, relations with a bank of deposit for custody of the funds and payment as specified in their agreement. But Essex Transportation Co. was not a member of this association and, therefore, not a party to any contract which the association made with the union.

We are faced with the question, therefore, whether an agreement such as the one alleged comes within the prohibition of the language quoted from Section 186. There is no doubt that the employees of Essex were employed in an industry affecting commerce. Our question becomes whether an agreement to pay money to these six trustees is a promise to pay to "any representative of any of his employees."

We approach the question with the thought in mind that these welfare funds represent a social device to be encouraged. See Upholsterers' International Union of North America v. Leathercraft Furniture Company, 82 F. Supp. 570 (D. C. E. D. Pa. 1949). We are also conscious of the fact that abuses in the use of these funds had been the subject of public discussion. It was thought that in some instances employers had been induced to agree to pay into welfare funds over which they had no control and, indeed, over which members of the union itself had no knowledge or control. This appears quite clearly in the discussion of this portion of the Taft-Hartley Act when the matter was before the Congress.

Thus, Senator Taft stated:

". . . the purpose of the provision is that the welfare fund shall be a perfectly definite fund, that its purposes shall be stated so that each employee can know what he

is entitled to, can go to court and enforce his rights in the fund, and that it shall not be, therefore, in the sole discretion of the union or the union leaders and usable for any purpose which they may think is to the advantage of the union or the employee . . . The tendency is to demand a welfare fund as much in the power of the union as possible. Certainly unless we impose some restrictions we shall find that the welfare fund will become merely a war chest for the particular union . . ". 93 Cong. Rec. 4746-7 (1947).

Senator Byrd stated:

". . . I happen to have been a patron of a similar amendment to the Case bill last year which was adopted by a substantial majority. The reason that amendment was offered . . . was because Mr. John Lewis, the president of the United Mine Workers, was attempting to obtain a royalty of 10 cents a ton on all coal mined, the money thus obtained to be placed in a fund to be controlled exclusively by the labor union." 93 Cong. Rec. 4678 (1947).

Senator Ball stated:

". . . the sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them, and that they shall not degenerate into bribes." 93 Cong. Rec. 4678 (1947). See also 93 Cong. Rec. 3562-66, 3634 (1947).

With this background it is not hard to see what the lawmakers were after. They were forbidding money to be paid to representatives of unions unless through a trust

fund, the requirements for which were set up in some detail.[3]

We think in this instance the promise of the employer (if indeed the promise was made)[4] was not a promise "to any representatives of any of his employees." The promise alleged was to pay these trustees. These trustees were not, in our judgment, representatives of the employees. They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and

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[3]"(c) The provisions of this section shall not be applicable . . . or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefits of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness, insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund . . . and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities." 28 U. S. C. §186(c) (1952).

[4]The reason for this qualification is that in the agreed statement of fact submitted to this Court it was said that there was testimony to the effect that the promise was made but there was not any admission by the defendants that they accepted this testimony as true.

have fiduciary duties in connection therewith as do any other trustees. The terms under which they act were carefully spelled out.

We think that the promise in this case is outside the evil which the Congress was endeavoring to erase in the sections of the statute which we have quoted. Since the fact situation is outside that evil, we do not think we should enlarge an application of the statute to void the type of arrangement which has met with legislative sanction, judicial approval and is a growing trend in employer-employee relations.

The judgment of the district court will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, et al.,
Petitioners,

vs.

SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, a Corporation, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

We do not believe that the petition herein sets forth the case in its true light.

The statute (Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. Sec. 141 *et seq.*), reads in part as follows:

> "Sec. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

The purpose of this legislation is shown by the supplement to the Senate Report on Senate Bill 1126 which appears at page 458 of the Legislative History LMRA 1947, and which reads in part as follows:

> "The amendment proceeds on the theory that union leaders should not be permitted, without reference to the employees, to divert funds paid by the company, in consideration of the services of employees to the union treasury or the union officers, except under the process of strict accountability."

This case does not involve the question whether an employer can put some of his *own money* into a joint venture with a union. It involves *wages,* or, in the language of the Senate Committee, "money paid by the company in consideration of the services of employees."

The entire legislative history of this section shows that it was intended to provide that *wages* of union members should not be diverted from their pay checks to union funds or to finance union programs *except as specifically permitted by the statute.*

There *is* a perfectly plain and simple way under the statute by which all of the laudable purposes in which the union is interested can be accomplished.

If the union wishes to devote two and one-half cents an hour or ten cents an hour *of the earnings of its members* to those laudable purposes it should *increase its dues* by this amount and the transaction would be entirely legal and not in violation of the statute.

This, however, would require the concurrence of two things:

First. An affirmative vote of the union membership in favor of increasing the dues for the purpose of financing these projects.

Second. A written "checkoff" or authorization to the employer to deduct this sum from the wages of his employees and to pay it to the union.

The statute provides that employees shall have the *right* to say how much of their earnings shall be taken out of their pay checks and paid over to the union or for its benefit for such purposes and that each employee must individually and *personally authorize* this over his own signature. (Sec. 302(c)(3).)

For reasons best known to the union it refuses to follow this procedure. Without complying with these statutory requirements it seeks to divert part of the earnings of its members from their pay checks and into a trust established to finance and operate the Joint Industry Board described in the petition herein.

The union argues that it may lawfully do this because the trust is a legal entity, separate and distinct from the union, and therefore payment to the trust

does not constitute payment to a "representative" as prohibited by the statute. (Petition pp. 15-17.)

We emphasize here that this "trust" is not an independent agency. The opinion under attack in this petition plainly demonstrates that it was not. The union originated it. The union appoints and controls one-half of the trustees who run it. The union threatens to cause a work stoppage of plaintiffs' employees to compel plaintiffs to contribute to it. As pointed out in the opinion of the Ninth Circuit, the trust could not function or operate without the concurrence and participation of the union. The basic fact here is that the union seeks to "divert funds paid by the company in consideration of the services of employees" from the pay checks of employees, not to an independent agency or enterprise, but to *a union program over which the union exercises a very substantial degree of control.*

The fact that the union program may be laudable is immaterial. The statute does not permit it. If the money were paid *directly* to the union by the employer the fact that the union intends the money to be used for apprenticeship training, dispute settlement, voluntary arbitration or the like, would not prevent the payments from being a violation of the statute. Paying the money not to an independent agency but to a fund over which the union has one-half the power of control is no less a violation.

What the union is *really* saying in its petition is that Congress *should* have included these laudable purposes within the exemptions set forth in Section

302(c)(5). The Congress, however, did not do so and the United States Court of Appeals for the Ninth Circuit properly declared that this attempt to siphon off money from the pay checks of employees and into such union-sponsored projects was a violation of the statute.

ARGUMENT.

NO IMPORTANT PRINCIPLE INVOLVED.

It is always important that the law be enforced. That, however, is not the kind of "importance" which demands that the case be reviewed by this Court. The fact that other unions are interested in trying to do the same thing does not make the case "important" in that sense either. Where there is a plain, simple, easy and legal way under the statute by which the union can carry out and finance as many laudable programs as it sees fit, *namely, by dues increase and written check-off* on individual members, the insistence of this union that it be permitted to do this in *some other way* does not justify a review by this Court.

NO CONFLICT BETWEEN CIRCUITS.

There is no conflict between the decision of the United States Court of Appeals for the Third Circuit in the *Essex* case (*United Marine Division v. Essex Transportation Co.*, 216 F. 2d 410) and the decision of the United States Court of Appeals for the Ninth Circuit in the case at bar.

As pointed out by the Court below, the factual situations are totally different. In the *Essex* case the opinion states:

> "This is an appeal from a judgment for the defendant in a suit brought to compel the payment by the employer of money *to a pension trust for employees.*" (Emphasis supplied.)

In other words, it was a trust "for the sole and exclusive benefit of the employees * * * and their families and dependents" as specified in Section 302 (c).

In referring to the duties of the trustees under such trust the Court in the *Essex* case said:

> "They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. *The terms under which they act were carefully spelled out.*" (Emphasis supplied.)

Thus, the trust was in exact compliance with the requirements of the statute.

The *only* questions in the *Essex* case were: (1) Whether Essex Transportation Company could lawfully pay into this trust where it had not been a member of the employer association or a party to the contract creating the trust; and (2) whether it was bound by an oral promise to do so.

A mere reading of the statute will reveal that while the *trust agreement* is required to be set forth in writing, including "the detailed basis on which such payments are to be made" to employees and their

families and dependents, it *does not* require that the *promise to pay* into the trust be in writing as suggested at page 10 of the petition herein.

For this reason, the Third Circuit decision *did not* "necessarily recognize that the provision in subdivision (c) (5) of Section 302 excepting trust funds was not applicable" as claimed at page 10 of the petition herein.

We quote from the opinion in the *Essex* case as follows:

> "This *fund was set up by an agreement in writing* and the trustees had also established, through an agreement in writing, relations with a bank of deposit for custody of the funds and payment as specified in their agreement. But *Essex Transportation Co. was not a member of this association and, therefore, not a party to any contract which the association made with the union.*" (Emphasis supplied.)

The language emphasized sets forth the point of law involved in the *Essex* decision.

As pointed out in the opinion of the Ninth Circuit, the *Essex* case did *not* decide that payment to any and every trust jointly controlled by trustees appointed by a union and by employers was exempt from the prohibitions of Section 302 of the statute. Therefore, the Ninth Circuit did *not* "reject" the interpretation of the word "representative" by the Third Circuit, as claimed by petitioners (Petition p. 7), and there is no conflict between the decisions in the Third Circuit and the Ninth Circuit.

NO CONFLICT WITH RYAN DECISION.

There is no conflict between the decision of the Court of Appeals for the Ninth Circuit and the opinion of this Court in the *Ryan* case (*U. S. v. Ryan,* 350 U.S. 299) for the simple reason that they do not involve the same questions, either of law or fact.

The *Ryan* case involved the question whether the term "representative" as used in the statute meant only "exclusive bargaining representative."

This Court held that it did not. In so deciding, this Court declared that "a narrow reading of the term 'representative' would substantially defeat the congressional purpose." The Ninth Circuit followed and applied that principle in this case.

Petitioners argue that the opinion of this Court in the *Ryan* case "did not lend any support" to and did not "authorize" the conclusion of the Ninth Circuit in this case. (Petition pp. 12, 13.) If this be so, it is only because the two cases involve different questions of law and fact. For the very reason that they *do* involve different questions of law and fact the two decisions *cannot* be in conflict.

THE JOINT INDUSTRY BOARD WAS A LABOR ORGANIZATION.

The opinion of the Ninth Circuit clearly sets forth how and why the Joint Industry Board falls within the statutory definition of a labor organization. It so clearly does so that there is no need to resort to a "broad" or "liberal" interpretation of the language

of the statute in order to bring the Joint Industry Board within its terms. If it *were* necessary to do so, however, this Court in the *Ryan* case clearly indicated that such course should be followed in order not to "defeat the congressional purpose."

The Trust sets forth as one of its purposes:

> "To aid in the settlement of any and all disputes of any nature whatsoever which may arise between the union, its members, agents and/or representatives and the above-named association, its members, and all other employers of union members who are signatories to agreements with the union."

Prior to the establishment of this trust Local 75, admittedly a labor organization, performed this function. By the device of establishing a Joint Industry Board Local 75 has transferred a part of its own work, functions and duties to such Board which, to that extent is a labor organization.

PAYMENTS TO THE JOINT INDUSTRY BOARD CONSTITUTE PAYMENTS OF A THING OF VALUE TO LOCAL 75.

In order to violate the statute it is not necessary or indispensable that the money be paid *directly* to the labor organization. For example: Payments by an employer to the union's landlord or insurance carrier would relieve the union of certain operating expenses and would thereby constitute a "thing of value" as specified in the statute. As pointed out in the opinion of the Ninth Circuit, Local 75 did not

abdicate or divest itself of the functions of settling disputes with the employers to a completely independent agency. It turned them over to the Joint Industry Board, an agency which *could not function* without the participation and consent of Local 75. *All* the expenses of operating this agency were paid for by the employers. Therefore, by this device Local 75 caused the employers to pay a part of its own operating costs and expenses and thereby received "a thing of value" from them. This is forbidden by the statute.

JOINTLY CONTROLLED TRUSTS FOR OTHER PURPOSES NOT PERMITTED.

The union asks this Court to consider this case on the grounds that:

> "The validity of numerous legitimate trust funds created through collective bargaining, for administration of joint labor-management programs for apprenticeship training, disputes settlement and voluntary arbitration, industrial safety and the like, has been placed in doubt by the instant decision of the Ninth Circuit Court of Appeals."

Notwithstanding the fact that the statute plainly declares that such jointly controlled funds must be for the "sole and exclusive benefit of employees * * * and their families and dependents", the union seeks to have this Court declare that joint labor-management trusts for any of the above purposes enumerated by the union are *also* permitted by the statute.

The reply to this claim appears in the following language from the opinion of the Ninth Circuit as follows:

> "It is said that the trustees were not representatives of employees because they were trustees of a welfare fund, and were not acting as representatives of either union or employers since they had fiduciary duties in connection with a trust fund. We think that a mere reading of § 302 demonstrates the fallacy of any such position. If that section, as Essex suggests, means that 'trustees of a fund' are for that reason not representatives within the meaning of the Act, then part 5 of subdivision (c) was wholly unnecessary and all the careful statement of an exception found there would be wholly meaningless. For the exception does not follow from the mere fact that there are trustees of a fund, but the fund must be subject to all the detailed limitations there stated. But the decision in United States v. Ryan brushed away all such narrow notions of the meaning of the term 'representatives' as that used in Essex. The court said (p. 304, 350 U.S.): 'Further, a narrow reading of the term "representative" would substantially defeat the congressional purpose. In 1946 Congress was disturbed by the demands of certain unions that the employers contribute to "welfare funds" which were in the sole control of the union or its officers and could be used as the individual officers saw fit. The United Mine Workers' demand that mine operators create a welfare fund for the union by contributing 10 cents for each ton of coal mined, caused the Congress to act. The Case Bill H.R. 4908, 79th Cong., 2d Sess.,

> which regulated welfare funds in a manner similar to § 302 was enacted in 1946, but was vetoed by the President. The following year the Taft-Hartley Act containing § 302 was passed over another veto. But, if "representative" means only the "exclusive bargaining representative," the explicit limitations on welfare funds in § 302 (c) (5) may be easily evaded. Payments made directly to union officials, or to other individuals as *trustees* would apparently be excluded from § 302. Thus, a narrow construction would frustrate the primary intent of Congress.'" (Emphasis supplied.)

This Court, itself, has declared that the statute may not be evaded by the simple expedient of interposing a trustee between the employer and the union. The statute prescribes *what* trusts are permitted and the Ninth Circuit correctly declared that the enumeration of these trusts was unnecessary if *all* trusts for *any* purposes were permitted.

CONCLUSION.

If we thought that this Court could be persuaded to decide the many unresolved questions involving labor-management trusts we would gladly join with petitioners in asking this Court to issue such a writ. Only *this* case is before the Court however, and it was decided on its particular facts.

As it is not the function of this Court to issue advisory opinions on unresolved and, as yet, unliti-

gated questions, it is respectfully urged that the petition be denied.

Dated, San Francisco, California,
December 26, 1957.

Respectfully submitted,
ROTH AND BAHRS,
By GEORGE O. BAHRS,
Attorneys for Respondents.